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Supreme Court of the United States

OCTOBER TERM, 1967

No. 700

BROOKS LEE ANDERSON, PETITIONER,

v.

WILBURN C. JOHNSON, WARDEN, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRINTED FOR THE COURT BY THE UNITED STATES GOVERNMENT PRINTING OFFICE

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[fol. 1]

DOCKET ENTRIES OF CLERK OF UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENNESSEE, NO. 3569

Date	
8-30-63	J.S. 5
8-30-63	Pauper's Oath
11-10-64	J.S. 6
8-30-63	Order entered directing clerk to file Petition for Writ of Habeas Corpus in Forma Pauperis; . . . appointing Kent Sandidge, III, attorney to represent Petitioner and requesting that he prepare and file amended or supplemental Petition; . . . Judgment reserved pending the filing of amended or supplemental Petition. (Attested copies to Kent Sandidge, III, Henry C. Foutch, Assistant Attorney General, and Petitioner, Brooks Lee Anderson)
8-30-63	Petition for Writ of Habeas Corpus with Jurisdictional Statement, and copies of original indictment and minute entries from Circuit Court Clerk, Maury County, Tennessee, filed. (Attested copies of all documents to Kent Sandridge, III and to Henry C. Foutch)

[fol. 2]

2-10-64	Letter of Appearance from the Respondent filed by Ed R. Davies, Special Counsel.

[fol. 3]

4- 7-64	Amended and Supplemental Petition for Writ of Habeas Corpus on behalf of Brooks Lee Anderson, filed by Kent Sandidge, III, Certificate of Service Attached. (Attested copy mailed to petitioner)
4- 8-64	Order entered that Writ of Habeas Corpus issue directing Respondent to bring petitioner before the Court on May 18, 1964, 9:00 A.M., to show cause why petitioner is not entitled to relief prayed for. (Attested copy to Kent Sandidge, III, to Ed R. Davies, and to Petitioner)

Date	
4- 8-64	Writ of Habeas Corpus Issued: 2 copies with attested copy of Order delivered to U. S. Marshal for service.
4- 9-64	Writ of Habeas Corpus executed by delivering copy to Lynn Bomar, Warden returned by U. S. Marshal and filed. $4.80.
4-28-64	Answer filed. Certificate of service attached.
4-30-64	Motion for a Continuance with Affidavit of Ed R. Davies, Special Counsel, filed on behalf of Respondent. Certificate of Service attached.
[fol. 4]	
4-30-64	Motion for Leave to Take Deposition of petitioner with Affidavit of Ed R. Davies, and Brief in Support of Motion, filed on behalf of Respondent. Certificates of Service attached.
5-15-64	Consent Order entered that Respondent's motion for leave to take discovery deposition of petitioner is disallowed; that Respondent's motion for a continuance is granted, hearing rescheduled for 9:00 A.M. on Tuesday, May 26, 1964. (Kent Sandidge and Ed R. Davies notified)
5-20-64	Motion filed by Petitioner for the Court to enter an Order directing the Clerk of the Court to issue subpoena to A. J. Morton on behalf of the petitioner, and the costs for serving subpoena and the witness fee be paid by the United States. Certificate of service attached.
5-20-64	Order entered directing Clerk to issue subpoena to A. J. Morton, for appearance May 26, 1964 and the costs incurred for service be paid in the same manner as witness subpoenaed on behalf of Govt. Attested copy to U. S. Marshal, to Kent Sandidge, to General Foutch, and to petitioner.

Date	
[fol. 5]	
5-20-64	Subpoena issued to A. J. Morton, Morton Funeral Home, Columbia, Tenn. for appearance 9:00 A.M., May 26, 1964, delivered to U. S. Marshal for service.
5-21-64	Subpoena to A. J. Morton returned by U. S. Marshal, UN-executed, and filed.
5-22-64	Order entered upon application of Atty. for petitioner and by consent of atty. for respondent that case set for hearing 5-26-64 be passed to be reset at a later date. (Attested copy to Kent Sandidge, Ed Davies, and Brooks Lee Anderson)
6-22-64	Order entered directing the Clerk to issue subpoena to A. J. Morton, Morton Funeral Home, Columbia, Tenn. for appearance 9:00 A.M., July 7, 1964, costs incurred to be paid in the same manner as witnesses subpoenaed in behalf of the U.S. (Attested copies to Kent Sandidge, III, Ed R, Davies, and petitioner, Brooks Lee Anderson)
6-23-64	Subpoena issued to A.J. Morton, Morton Funeral Home, Columbia, Tenn. for appearance 9:00 AM, July 7, 1964 on behalf of petitioner, delivered to U.S. Marshal for service, with 2 attested copies of Order.
6-24-64	Subpoena to A. J. Morton returned by U.S. Marshal executed and filed. MEF $12.80
[fol. 6]	
7- 2-64	Motion to be allowed to Amend Petition filed on behalf of petitioner. Certificate of Service attached.
7- 2-64	Subpoena issued to B. P. Andrews and A. E. Fitzgerald to appear at 9:00 A.M., July 7, 1964 on behalf of the defendant.
7- 7-64	Subpoena returned executed as to B. P. Andrews; Un-executed as to A. E. Fitzgerald, Deceased, and filed. MEF $11.84.

Date	
7- 7-64	Order entered that James E. Meadows be and he hereby is substituted as respondent in the place of Lynn Bomar, who is deceased.
7- 7-64	Motion to Amend Answer filed. Certificate of service attached.
7- 9-64	Deposition Subpoena issued to Clyde Fraser, Larce M. White, and Flo Fleming, to appear on behalf of the defendant on July 16, 1964, at 2:00 P.M., in U. S. Commissioner's Office, Nashville, Tennessee.
7-20-64	Motion filed on behalf of petitioner for an Order directing the United States to pay statement of Jack Bell, Shorthand Reporter, in the amount of $16.00 for services rendered petitioner.

[fol. 7]

7-20-64	Order entered that ruling on motion of petitioner for an Order directing the United States to pay Jack Bell, Shorthand Reporter, for services rendered, is reserved pending final disposition of case on merits. (Attested copy to attys. of record and to petitioner)
7-27-64	Deposition of Larce M. White filed Deposition of Clyde Fraser filed. Deposition of Flo Flemming filed.
7-29-64	Consent Order entered, after hearing 7-7-64, granting petitioner's motion to amend petition; . . . granting resondent's motion to amend answer; . . . recessing the cause until 8-7-64 when the case will be taken under advisement subject to further orders. (Kent Sandidge, III and Ed R. Davies, attys. of record notified)
8- 4-64	Brief and Argument with certificate of service, filed by petitioner.
8- 6-64	Deposition Subpoena returned by U.S. Marshal executed as to Clyde Fraser and Larce M. White. MEF $4.00.

Date

8- 6-64 Deposition Subpoena returned by U.S. Marshal un-executed as to Flo Fleming; unable to locate.

[fol. 8]

8- 7-64 Memorandum of Authorities filed by Respondent, Cerficiate of Service attached.

11-10-64 Order entered: Court is of the opinion that petition is without merit and is denied. Attested copy to Kent Sandidge, III, to Ed R. Davies, and to petitioner, Brooks Lee Anderson.

11-24-64 Motion for Issuance of a Certificate of Probable Cause filed. Certificate of service attached.

11-24-64 Notice of Appeal filed. Certificate of service attached

11-24-64 Motion to be allowed to withdraw as Attorney for the petitioner filed. Certificate of service attached.

11-24-64 Order entered granting certificate of probable cause, allowing appeal in forma pauperis, and directing the Court Reporter to prepare a transcript of the trial proceedings to be paid for by the United States. (Copy to Kent Sandidge, Ed R. Davies, Brooks Lee Anderson, and Miss Opal Smith, Court Reporter).

11-24-64 Order entered allowing Kent Sandidge to withdraw as attorney for the Petitioner. (Copy to Mr. Sandidge, Ed R. Davies, and Brooks Lee Anderson).

[fol. 9]

11-30-64 Motion of Kent Sandidge, III, Atty. for an order requiring USA to pay Court Reporter bills incurred on behalf of petitioner.

12-29-64 Order entered extending Time for Docketing Record on Appeal to Feb. 20, 1965. (Attested copy to Petitioner, Brooks Lee Anderson, to Ed R. Davies, Atty. and to Miss Opal Smith, OCR)

Date

2-17-65 Copy of Motion to Extend Time for Filing Record and Docketing Appeal to and including April 20, 1965 directed to the U. S. Court of Appeals, Cincinnati, Ohio by Ed R. Davies, counsel for Respondent, filed.

2-19-65 Copy of Motion filed in the 6th C.C.A., by Ed R. Davies, to Extend Time for Filing Record and Docketing Appeal until April 20, 1965 received from U.S. Court of Appeals with notation "Motion Granted: s/ Clifford O'Sullivan, U. S. Circuit Judge," copy of letter delivered to Miss Opal Smith, OCR.

4-19-65 O. C. R. transcript of proceedings on July 7, 1964, filed.

4-19-65 Record on Appeal mailed to Hon. Carl W. Reuss, Clerk, U. S. Court of Appeals, Cincinnati 2, O. (Copy of Clerk's Certificate and Index, with photostatic copy of docket entries, to Petitioner, Ed R. Davies, Special Counsel, and Henry C. Foutch, Asst. Atty. Gen.)

[fol. 10]

4-21-65 Receipt of Record on Appeal acknowledged by Clerk, U. S. Court of Appeals, filed in that Court as No. 16533.

[fol. 11]

DOCKET ENTRIES OF CLERK OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, NO. 16,533

Date	
1965	
Feb. 17	Motion of Appellee for extension of time to file record and docket appeal (Granted—O'Sullivan, J.)
April 20	*Certified record* (1 vol. pleadings and 1 vol. testimony), filed; and cause docketed
April 23	Appearance of counsel for Appellee
April 29	Motion of Appellant for the appointment of counsel
June 21	Order appointing counsel for Appellant and directing that said counsel file a brief for Appellant within sixty days from this date (Phillips, J.) 0-269
August 16	Stipulation: Appellant's brief to 9/20/65 (Approved)
Sept. 20	Four typewritten copies of Brief for Appellant
Sept. 20	Four typewritten copies of Appendix to Brief for Appellant

[fol. 12]

Sept. 20	Proof of service of brief and appendix for Appellant
Oct. 27	Stipulation: Appellee's brief to 11/30/65 (Approved)
Dec. 3	Stipulation: Appellee's brief to 12/31/65 (Approved)

Date	
1966	
Feb. 11	Stipulation: Appellee's brief to 3/15/66 (Approved)
Mar. 15	Twenty copies of Brief for Appellee, with proof of service
Apr. 19	Cause argued and submitted (Before: Phillips, McAllister and Cecil, JJ.) 0-592
Dec. 22	Judgment of the District Court affirmed P-188
Dec. 22	Opinion by Phillips, J. (McAllister, J., dissenting) 41 pages
Dec. 30	Order amending opinion (McAllister, J.) P-196
1967	
Jan. 12	Copy of letter addressed to Clerk of the Supreme Court of the United States requesting writ of certiorari
[fol. 13]	
Jan. 17	Certified record for certiorari application mailed to Clerk of the Supreme Court
Feb. 10	Order amending opinion (Phillips, Cecil and McAllister, JJ.) P-260
Mar. 27	Notice of filing petition for certiorari (Sup. Ct. No. 1522 Misc.)
Oct. 16	Certified copy of order of Supreme Court granting certiorari on 10/9/67 (Case transferred to Appellate Docket as No. 700)

[fol. 14]

MINUTE ENTRIES OF CIRCUIT COURT OF MAURY COUNTY, TENNESSEE, REGARDING INDICTMENT AND CONVICTION OF PETITIONER (May-August, 1949)

Be it remembered that a Circuit Court began and held for the County of Maury at the Court House in the City of Columbia, County of Maury and State of Tennessee on the 4th Monday of May, 1949, the same being the 23rd day of May, 1949. Present and presiding the Hon. Joe M. Ingram, Judge of the 11th Judicial Circuit of the State of Tennessee, Paul F. Bumpus, Attorney General for said Circuit Court, Dabney Anderson, Clerk of the Circuit Court of Maury County and Flo F. Fleming, Sheriff, and the following proceedings were had and entered of record, to-wit:

The Sheriff returned into open Court the State Venire Facias, showing that the Jury Commissioners of Maury County, Tennessee, met on May 9, 1949, and as the law directs using a boy under the age of ten (10) years drew one hundred names from the Jury Box to constitute a panel for the May Term, 1949, to-wit:

* * * * *

Thereupon the names of these Jurors in the Venire Facias who appeared and answered present were placed on separate scrolls and placed in the hat according to [fol. 15] law were drawn in open Court by a boy under the age of ten years as required by law. The following names as Grand Jurors, to-wit: E. E. Woody, Foreman, J. Dawson Frierson, Jr., Clerk, Reese Denton, Edward Criddle, Bill Scott, Wesley Edwards, Sam Westall, J. W. Harris, C. D. Stroud, Webb Eskew, O. M. Delk, Wallace Burt, Hunter Brooks, and the Jury in althings as the law directs being duly elected, impaneled, sworn and charged to inquire for the body of the County of Maury aforesaid do retire to consider of the indictments and presentments in charge of their sworn officer, W. T. Huff, a Constable of Maury County who had been sworn accord-

ing to law to take charge and wait upon said Grand Jury for the present term of the Court. Thereupon the following men were drawn to serve as Jury No. 1, to-wit: Carl East and C. R. Blackman.

E. P. Walters, Deputy Sheriff and S. T. Young, Constable are to wait upon Court.

* * * *

MAURY COUNTY
STATE OF TENNESSEE

GRAND JURY PARTIAL REPORT

TO THE HONORABLE JOE M. INGRAM, JUDGE OF THE CIRCUIT COURT:

We, the Grand Jurors for Maury County, on this 23rd day of May, 1949, report in open Court the following indictments and presentments found by us against the following names persons, viz:

[fol. 16] * * * *

No. 5112 RAPE

BROOKS LEE ANDERSON ALIAS EARL ANDERSON

SS: E. E. Woody, Foreman

STATE OF TENNESSEE, MAURY COUNTY
CIRCUIT COURT

MAY TERM, A. D., 1949

The Grand Jurors for the State of Tennessee, good and lawful men, duly elected, impaneled, sworn and charged to inquire for the body of the County of Maury and State aforesaid, upon their oaths, aforesaid, present: That Brooks Lee Anderson, alias Earl Anderson, in said County, heretofore, to-wit, on the 20th day of April, 1949, did unlawfully and feloniously carnally know a certain female, to-wit: one Annie Katherin Frierson, forcibly and

against her will, against the peace and dignity of the State.

SS: P. E. Bumpus, Attorney-General

All witnesses endorsed hereon except Dayton Booker, Charlie C. Williams, Dr. Francis, sworn in open Court upon this indictment and examined before the Grant Jury May 23rd 1949.

SS: E. E. Woody
Foreman of the Grand Jury

[fol. 17] MAY TERM, 1949

No. 5112 RAPE

STATE OF TENNESSEE

vs.

BROOKS LEE ANDERSON ALIAS EARL ANDERSON

CLARENCE FRIERSON, Prosecutor

Spa. for the State: Clarence Frierson, Annie Katherine Frierson, Henry Dobbs, Dayton Booker, Charlie C. Williams, Dr. J. E. M. Francis.

Paul F. Bumpus, Attorney-General

A TRUE BILL

E. E. Woody, Foreman Grand Jury

Ordered that Court adjourn until in the morning at nine o'clock.

SS: Joe M. Ingram, Judge

Tuesday Morning, May 24, 1949

Court met pursuant to adjournment present and presiding the Hon. Joe M. Ingram, Judge, etc.

No. 5112

STATE OF TENNESSEE

vs.

BROOKS LEE ANDERSON

It is ordered by the Court that the above styled case be set for trial on the 2nd day of June, 1949.

Ordered that Court be adjourned until June 2nd, 1949.

SS: Joe M. Ingram, Judge

[fol. 18] Thursday Morning, June 2, 1949

Court met pursuant to adjournment present and presiding the Hon. Joe M. Ingram, Judge, etc.

No. 5112

STATE OF TENNESSEE

vs.

BROOKS LEE ANDERSON

Came the Attorney General for the State and moved the Court to pass this case, all of which the Court doth order, adjudge and decree.

Ordered that Court adjourn until in the morning at nine o'clock.

SS: Joe M. Ingram, Judge

Thursday Morning, July 7, 1949

Court met pursuant to adjournment present and presiding the Hon. Joe M. Ingram, etc.

No. 5112

STATE OF TENNESSEE

vs.

BROOKS LEE ANDERSON

It is ordered by the Court that the above styled case be set for trial on the 1st day of August, 1949.

SS: Joe M. Ingram, Judge

Monday Morning, August 1, 1949

Court met pursuant to adjournment present and presiding the Hon. Joe M. Ingram, Judge, etc.

[fol. 19] No. 5112

STATE OF TENNESSEE

vs.

BROOKS LEE ANDERSON ALIAS EARL ANDERSON

Came the Attorney General for the State and the Defendant in proper person and by Counsel. The Defendant being charged and arraigned hereon pleads not guilty to a charge of Rape and for his trial submits to the mercy of the country and the Attorney General doth the same. Thereupon a Jury of good and lawful men, Citizens of Maury County, Tennessee, was duly elected and impaneled, to-wit: J. R. Luttrell, F. K. Odil, A. H. Smith, Mack Choate, John Chaffin, B. P. Andrews, Joe Dillehay, Everett Cheek, J. C. Bayer, Henry Jett, Floyd Cook and W. H. Burks who were in althings charged and sworn to well and truly try the issues joined between the State of Tennessee as the Plaintiff and Brooks Lee Anderson alias Earl Anderson as the Defendant upon a plea of not guilty

to a charge of Rape and a true verdict render according to the law and the evidence.

After hearing all the evidence in the case, the argument of counsel, the receiving the charge of the Court, the Jurors aforesaid upon their oaths aforesaid in charge of their sworn officers, to-wit: H. H. Borum and A. M. Harlan, retired to consider their verdict.

After taking time to consider their verdict the Jurors aforesaid, upon their oaths aforesaid in charge of their [fol. 20] sworn officers returned into open Court and said, "We, the Jury, in this case, find the defendant guilty as charged in this indictment, and fix his punishment at 49 years and one day in the State Penitentiary. M. W. Choate, Foreman."

* * * *

Ordered that Court adjourn until Saturday Morning, September 10, 1949.

SS: Joe M. Ingram, Judge

[fol. 21]

PETITION FOR HABEAS CORPUS
FILED IN DIVISION II,
DAVIDSON COUNTY CRIMINAL COURT

(June 12, 1962) (Handwritten)

IN THE CRIMINAL COURT OF DAVIDSON COUNTY
NASHVILLE, TENNESSEE

DIVISION (2)

15872

STATE OF TENNESSEE)
vs.) SS.
COUNTY OF DAVIDSON)

THE PEOPLE OF THE STATE OF TENNESSEE EX REL.
BROOK LEE ANDERSON, PETITIONER

versus

TENNESSEE STATE PENITENTIARY,
MR. LYNN BOMAR, WARDEN, ET AL., RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS

Your Petitioner herein Brook Lee Anderson respectfully represent unto this Court that he his unlawfully being held, illegally restrained of his liberty in the Tennessee State Penitentiary at Nashville, Tennessee by the above captioned officer.

[fol. 22] Petitioner it will be notice was tried in the Circuit Criminal Court for the County of Maury in Columbia, Tennessee. Judge Joe M. Ingram presiding on the charge of rape, and on March 20, 1950 was sentence to be imprisoned in the aforesaid Tennessee State Penitentiary for a number of years, not more than forty nine (49), one day.

* * * *

The Petitioner contends the Grand Jury that indicted him was illegally impaneled because there was systematic and substantial exclusion of eligible negroes jurors from the Grand Jury, even though they were otherwise qualified.

* * * * *

The Petitioner contend, it was in violation of his constitution right under the 14th amendment of the United States Constitution for the Court to deprived him of his right to have negroes to sit impaneled as Jurymen to hear is case.

* * * * *

Wherefore, the petitioner respectfully prays this honorable Court to issues a writ of habeas corpus ordering and directing respondent to show cause why he should not be discharge from said unlawfully imprisonment in accordance with section 9676.5505 (3725) Part (4) of the Tennessee Code. All proceeding relative to the adjudge legal-
[fol. 23] ity of this restraint in Davidson County Criminal Court on ..... All that was made available to the petitioner is being sent along with this application.

Respectfully

/s/ BROOKS LEE ANDERSON

[fol. 24]

ORDER OF JUDGE JOHN L. DRAPER, JUDGE OF DIVISION II OF DAVIDSON COUNTY CRIMINAL COURT

(July 20, 1962) (Typed on Face of Petition)

July 20, 1962

This petition for writ of habeas corpus was addressed to Mr. Earl Hawkins, Clerk of the Criminal Court under date of July 11, 1962 and was presented to me on this date. It is my opinion that the matters alleged in the petition are matters which should have been called to the attention of the trial court upon a motion for new trial and if same was over-ruled, the case should have been appealed to the Supreme Court. * * * I am of the opinion that this is an attempt to substitute a writ of habeas corpus for an appeal, and for these reasons, the writ is refused under authority of Section 23-1809 TCA.

/s/ JOHN L. DRAPER
Judge

[fol. 25]

MINUTES OF DAVIDSON COUNTY CRIMINAL COURT

(December 7, 1962)

MINUTES, SEPTEMBER TERM, 7th DAY OF DECEMBER, 1962.

Friday, December 7, 1962

Court met pursuant to adjournment, present and presiding the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

PET. WRIT HABEAS CORPUS

STATE OF TENNESSEE EX REL,
BROOK LEE ANDERSON, PETITIONER

vs.

LYNN BOMAR, WARDEN,
TENNESSEE STATE PENITENTIARY, RESPONDENT

ORDER

It appears to the Court from a reading of the petition that the defendant was convicted for the crime of rape and sentenced accordingly.

It further appears to the Court that this writ of habeas corpus is being used by the petitioner to make a collateral attack against an otherwise valid judgment rendered by a Court of competent jurisdiction, and is an attempt to substitute the writ for an appeal or for a writ of error. This can not be done.

* * * *

[fol. 26] It, therefore, appears to the Court that the petition is without merit, either in law or fact, and the petition heretofore filed is dismissed and denied for the reasons hereinabove stated, and a copy of this order is herewith furnished the petitioner.

This the 7th day of December, 1962.

/s/ JOHN L. DRAPER
JOHN L. DRAPER
Judge

FILED: Dec. 7, 1962
J. SHEA, D. C.

Ordered that court stand adjourned until tomorrow morning nine o'clock.

/s/ JOHN L. DRAPER
Judge

[fol. 27]

JUDGMENT OF SUPREME COURT OF TENNESSEE

(May 8, 1963)

STATE EX REL BROOKS L. ANDERSON

v.

LYNN BOMAR, WARDEN, ETC.

DAVIDSON CRIMINAL
AFFIRMED

This cause coming on to be heard upon a transcript of the record from the Criminal Court of Davidson County and motion to dismiss appeal and affirm the judgment, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error, and no bill of exceptions and no assignments have been filed.

It is, therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that the petition for a writ of habeas corpus be dismissed, and that the petitioner be remanded to the further custody of the Warden, Lynn Bomar, for the purpose of completing the remaining portion of his prison sentence in the State Penitentiary.

This cause is remanded to the Criminal Court of Davidson County for the collection of the cost of the Court below, for which let procedento issue.

The cost of the appeal will be paid by Brooks L. Anderson, for which let execution issue. 5/8/63

[fol. 28]

PETITION FOR HABEAS CORPUS FILED IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

(August 31, 1963) (Handwritten)

IN THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENNESSEE NASHVILLE 3, TENNESSEE

Civil 3569 No.

BROOKS LEE ANDERSON, PETITIONER

vs.

MR. LYNN BOMAR, WARDEN, TENNESSEE STATE PENITENTIARY, NASHVILLE 9, TENNESSEE, RESPONDENT

* * * *

The Petitioner contends at the time of his trial Negroes were Systematic and Substantial excluded from jury duty, because of their race; even though they were other wise qualified.

* * * *

Wherefore, the petitioner respectfully prays this Court will issue a writ of habeas corpus, ordering and directing the respondent to show cause why he should not be discharge from said unlawfully imprisonment in accordance with section 9676.5506 (3725) part (4) of the Tennessee Code. All records has been made available to the petitioner is being sent along with this application.

Respectfully submitted

/s/ BROOKS LEE ANDERSON

[fol. 29]

AMENDED AND SUPPLEMENTAL PETITION FOR HABEAS CORPUS

(April 2, 1964)

IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3569

BROOKS LEE ANDERSON, PETITIONER

vs.

LYNN BOMAR, WARDEN, TENNESSEE STATE PENITENTIARY, NASHVILLE, TENNESSEE, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE WILLIAM E. MILLER, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE:

* * * *

5. The petitioner would respectfully show to the Court that he is restrained and imprisoned pursuant to sentence and judgment that are illegal and void in that petitioner was denied his rights which are guaranteed by the Constitution of the United States of America, and particularly the Fourteenth Amendment, and the facts and circumstances by which the petitioner's constitutional rights have been denied are as follows:

* * * *

[fol. 30] The petitioner would further show that the Grand Jury of Maury County, Tennessee, which returned an indictment charging him with rape, and the same being dated May 23, 1949, was composed entirely of white persons even though at the time of the meeting of the Grand Jury of Maury County, Tennessee, and for approximately ten to fifteen years prior thereto, no persons

of the Negro race had served on a Grand Jury of said county, even though in 1940, the United States Census showed that of a total population of 40,357 people in Maury County, Tennessee, 10,130 were Negroes and that in the 1950 census, the total population of Maury County was 40,368 of which 8,579 were members of the Negro race. The petitioner attaches hereto a certified copy of the census reports for Maury County, Tennessee for 1940 and 1950, the said certified record being dated January 15, 1964. The certified copy of said census is made Exhibit III to this petition.

* * * *

The petitioner would further show and does allege and contends that he was denied his due process of law in that at the time of the trial no Negroes were called and no Negroes served on the petit jury which convicted your petitioner and that they were systemtieally excluded from jury duty in Maury County, Tennessee. The petitioner relies on the same evidence and exhibit as stated above in regard to the Grand Jury of Maury County, Tennessee.

* * * *

[fol. 31] WHEREFORE, PETITIONER PRAYS:

1. That a Writ of Habeas Corpus be directed to the Respondent issued on his behalf so the petitioner may be brought before this court.
2. That respondent be required to appear and answer the allegations of this petition.
3. That after full and complete hearing, this court relieve petitioner of the unconstitutional detention, imprisonment, and sentence pronounced upon him, and order the respondent to discharge the petitioner from said unlawful imprisonment and detention.

* * * *

Respectfully submitted.

/s/ BROOKS LEE ANDERSON

[fol. 32]

LETTER FROM DIRECTOR OF BUREAU OF CENSUS REGARDING POPULATION OF MAURY COUNTY, TENNESSEE, BY RACE

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington 25

January 15, 1964

I HEREBY CERTIFY, That according to the official count of the returns of the SIXTEENTH AND SEVENTEENTH CENSUSES OF THE UNITED STATES, on file in the Bureau of the Census, the population of the County of Maury, State of Tennessee, by race, as of April 1, 1940 and 1950, respectively, was as shown below:

	1940	1950
Total population	50,357	40,368
White	30,225	31,782
Negro	10,130	8,579
Other races	2	7

/s/ R. M. SCAMMON
RICHARD M. SCAMMON
Director
Bureau of the Census

[fol. 33]

LETTER FROM DIRECTOR OF BUREAU OF CENSUS REGARDING ADULT MALE POPULATION OF MAURY COUNTY, TENNESSEE, BY RACE

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington 25

September 17, 1965

I HEREBY CERTIFY, That according to the official count of the returns of the SIXTEENTH AND SEVENTEENTH CENSUSES OF THE UNITED STATES, on file in the Bureau of the Census, the total number of males twenty-one years old and over, by color, for the County of Maury, State of Tennessee, as of April 1, 1940 and 1950, was as shown below:

	White males 21 and over	Nonwhite males 21 and over
1950	9,470	2,486
1940	8,853	2,918

/s/ HOWARD C. GRIEVES
HOWARD C. GRIEVES
Acting Director
Bureau of the Census

[fol. 34] ANSWER (April 28, 1964)

ANSWER

The Respondent, upon whom has been served a "PETITION FOR WRIT OF HABEAS CORPUS" apparently prepared by the petitioner's court-appointed attorney, and sworn to by the petitioner on April 2, 1964, hereby certifies and makes answer as follows:

* * * * *

[fol. 35] 5. The respondent admits that the petitioner has exhausted the remedies available to him in Tennessee Courts within the meaning of 28 U.S.C., Section 2254. The respondent is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4 of the said petition.

6. The respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the said petition. The respondent is in the process of obtaining certified copies of the arrest warrant, indictment, plea of petitioner, judgment and all minute entries pertaining to the material questions raised in said petition and will file these with the Court.

WHEREFORE, respondent prays the Court to dismiss the petition of Brooks Lee Anderson and to remand the petitioner to the custody of respondent for the completion of his sentence.

LYNN BOMAR, WARDEN
Respondent

By /s/ ED R. DAVIES
Attorney

[fol. 36] PETITIONER'S PROOF

TESTIMONY OF BROOKS LEE ANDERSON

DIRECT EXAMINATION

[Tr. p. 15]

BY MR. SANDRIDGE:

Q. State your name please.
A. Brooks Lee Anderson.
Q. Can you talk a little bit louder, Brooks?
A. Brooks Lee Anderson.
Q. I believe you are presently a resident of the State Penitentiary, are you not?
A. Yes, sir.
Q. The State Penitentiary out here in Nashville?
A. Yes, sir.
Q. How long have you been there?
A. Fourteen years, 11 months, and one week today.

* * * *

[fol. 37]

[Tr. p. 31]

Q. Have you been a resident of Maury County a long time?
A. Yes, sir—born there.
Q. You have lived there all your life?
A. Yes, sir.
Q. Where there any Negroes on your petit jury?
A. No, sir; there was not.
Q. Were they white man?
A. All white; yes, sir.
Q. Were they all men?
A. Yes, sir.
Q. Have you ever heard of any Negroes serving on the jury—
MR. DAVIES: We object to anything he has heard, your Honor.
THE COURT: Sustained.

BY MR. SANDIDGE:

Q. Have you ever seen any Negroes serve on any
[fol. 38] juries in Maury County?
A. No, sir.

* * * *

[fol. 39] CROSS EXAMINATION

BY MR. DAVIES:

* * * *

Q. Brooks, you are a member of the Negro race, are you not?
A. Yes, sir.

[Tr. p. 65]

Q. How many trials have you seen in Maury County?
A. I've "seed" quite a few of them.
Q. How many would you estimate?
A. Well, I'd estimate about ten, or 15, 20 or something like that.
Q. Ten, 15, or 20?
A. Yes, sir.
Q. There are trials other than your own trials that I am talking about. Is that correct?
A. Yes, sir.
Q. And you have never seen any colored people on any of the juries of those trials. Is that right?
A. No, sir.
Q. Over what period of time does that go back to?
A. Well, it goes as far as I can remember not as a—since I have been born that I can remember, I've never "seed" a colored juror.
Q. But you have stated that you have been in jail most of the time since 1929, have you not?
A. Off and on, yes.
[fol. 40] Q. When you got out of the Training and Agricultural School in 1929, did you come back to Maury County?
A. Yes, sir.
Q. How long did you stay in the training school?

A. Well, I'd say right—right around approximately about two years.

Q. So that would be about 1931—somewhere in there. You went in 1929. You stayed about two years, and you came back in 1931?

A. Somewhere along there.

Q. In 1932 you went to the workhouse for 11 months and 29 days. Is that right?

A. Yes, sir.

Q. In 1933—

MR. SANDIDGE: If your Honor please, I object. I don't know what he is doing this for.

MR. DAVIES: This man has testified—

MR. SANDIDGE: If it is credibility again, I think it is repetition.

THE COURT: What is this for?

MR. DAVIES: This man has testified that he has been there and has seen some 20 or 30 trials as I understand it, and I would just like to bring out the opportunity that this man has had to observe these trials.

MR. SANDIDGE: I withdraw the objection.

THE COURT: All right. Go ahead.

[fol. 41] BY MR. DAVIES:

Q. In 1932 you went to the workhouse, and stayed a year then?

A. Yes, sir.

Q. That would be 1933.

Q. In December 1933 you went to the state penitentiary for three to five years?

A. That's right.

Q. How long did you stay then?

A. Thirty-six months.

Q. Three years—that would be 1936.

You went back to the penitentiary in November of 1937? Is that correct?

A. Yes, sir.

Q. Three years for housebreaking?

A. (The witness did not reply.)

Q. Correct?

A. Yes, sir.

Q. How long did you stay on that sentence?

A. You say three to five years?

Q. Pardon.

A. How much did you say, three to five?

Q. Three years for housebreaking in 1937, November 22.

A. I think it was two years.

Q. You stayed two years then. So that would be 1939 that you came out. Is that correct?

A. Yes, sir.

[fol. 42] Q. In 1942 you went into the federal penitentiary?

A. Yes, sir.

Q. And got out in 1948?

A. Yes, sir.

Q. During the time that you were not in prison then, did you go to the courthouse regularly to observe these trials?

A. Well, yes, sir. I'd go whenever they'd have such as murder cases. I have "seed" three or four of those and different other little trials around in there.

Q. And you knew a good bit about law and the procedure from just sitting around there and watching these trials, didn't you?

A. No, sir; I didn't.

Q. These thirty-some-odd trials that you saw?

A. I didn't know anything about it. I'd just go to see this with the bunch.

* * * *

REDIRECT EXAMINATION

BY MR. SANDIDGE:

* * * *

[Tr. p. 78]

Q. You have been tried several times in Maury County yourself, haven't you?

A. Yes, sir.

Q. Before juries?

[fol. 43] A. Yes, sir; some of them.

Q. Have you had any Negroes on any jury that you have been tried before?

A. No, sir.

MR. SANDIDGE: That's all, if the Court please.

TESTIMONY OF JAMES E. MORTON

DIRECT EXAMINATION

[Tr. p. 79]

BY MR. SANDIDGE:

Q. Your name is James E. Morton?

A. Yes, sir.

Q. Where do you live?

A. On East State, Columbia, Tennessee.

Q. How long have you been a resident of Maury County?

A. All my life.

Q. Are you a businessman in the community?

A. I am.

Q. What business are you in?

A. Funeral director.

Q. You own a funeral home also?

A. A. J. Morton and Son.

[fol. 44] Q. A. J. Morton and Son?

A. That's right.

Q. How old are you?

A. Fifty-four years old.

Q. Are you in any organizations?

A. I am the President of the Maury County Voters Council.

Q. What type organization is that?

A. Well, that is soliciting registered voters and looking after the interest of the colored community in our town.

Q. How long have you been doing this kind—

MR. DAVIES: I can't hear what he is saying.

BY MR. SANDIDGE:

Q. Can you talk a little louder, Mr. Morton?

A. Yes, sir. I have been the President for 3½ years.

Q. And how long have you been doing this type work?
A. About six years.
Q. Have you been interested in the affairs of your race in Maury County?
A. I have.
Q. Have you been active in those affairs for a long number of years?
A. I have.
[fol. 45] Q. Do you keep abreast of developments in the betterment of your race in Maury County and so forth?
A. I do.
Q. Have you done this all your life or all of your adult life?
A. Since I have been grown. I have.
Q. Do you take an active part in those activities to better your race in Maury County?
A. I do.
Q. Mr. Morton, in 1950 and prior, do you know what percentage of the population of Maury County approximately were members of the Negro race?
A. About a—Well, I would say it was a third.
Q. Right around in there?
A. That's right.
MR. DAVIES: One third? I didn't understand.

BY MR. SANDIDGE:

Q. Was that your answer?
A. That's right—one third.
Q. Are many or few of those members of your race in Maury County qualified voters?
A. They are.
MR. DAVIES: We object to his conclusion, if your Honor please, of what the law is.
[fol. 46] THE COURT: It is a question of fact. Let him answer it. Go ahead.

BY MR. SANDIDGE:

Q. Your answer was?
A. They are.
Q. Were they registered to vote?
A. Yes, they were.

Q. Were they of such education that they were reasonable men?

A. They were.

MR. DAVIES: We object, if your Honor please.

THE COURT: Sustained.

BY MR. SANDIDGE:

Q. Did they have educational backgrounds?

A. They do.

Q. In 1950 and prior to 1950, do you know of your own personal knowledge whether any members of the Negro race of Maury County had been called for grand jury duty in that county?

A. Not that I know of.

Q. Do you know of your own personal knowledge whether in 1950 or any time prior thereto any members of the Negro race of Maury County had been called for jury duty on petit juries?

A. Not that I know of.

[fol. 47] Q. Would you have known about it had they been?

A. I would have.

MR. SANDIDGE: That is all, if your Honor please.

THE COURT: All right, Mr. Davies.

CROSS EXAMINATION

BY MR. DAVIES:

Q. You are a member of the NAACP, are you not, sir?

A. How's that?

Q. I say you are a member of the NAACP, are you not, sir.

A. Yes, sir; I am.

Q. You were a defendant in one of the Mink Slide cases tried in Maury County in 1946, were you not?

A. I was one of the defendants in the H Street trial, not Mink Slide.

Q. H Street?

A. H Street.

Q. Was that one of the cases growing out of the racial disturbance in 1946?

A. That's correct.

Q. Are you familiar with the case of Kennedy versus the State of Tennessee.

A. I am.

[fol. 48] Q. Did you testify in that case?

A. I did not.

Q. Did you testify in your own case?

A. I did not.

Q. There was a plea in abatement filed in all of these cases in regard to this same question, was there not, that question being the systematic exclusion of Negroes from the petit and grand juries?

A. I didn't understand your question.

Q. Both in the case in which you were a defendant and in the case of Kennedy versus the State of Tennessee, there was a plea in abatement filed by Mr. Looby and the other counsel in regard to the systematic exclusion of Negroes from jury duty in Maury County. Is that correct?

A. That's right.

Q. Did you hear testimony in your case and in the Kennedy case in regard to this plea in abatement?

A. I heard the testtimony in my case. I didn't hear the testimony in the Kennedy case.

Q. The plea in abatement was denied by each trial court, was it not?

A. I can't say for only but one.

Q. It was denied in your case?

A. (The witness did not reply.)

[fol. 49] Q. Was your case appealed to the Supreme Court of Tennessee?

A. No, sir.

Q. Were you tried in Lawrenceburg?

A. That's correct.

Q. You were tried on a change of venue. Is that correct?

A. Well, I—

Q. At any rate, your trial was transferred from Maury County to Lawrence County, Tennessee. Is that correct?

A. Yes, sir.

Q. And on a trial on the facts, you were acquitted?

A. I was acquitted in Lawrenceburg.

Q. That's correct. All right.

Now, you state that you are not familiar with the testimony in the case of Kennedy versus the state?

A. That's right.

Q. You were not present in court when that case was tried?

A. That's correct.

Q. You were not?

A. I was not.

Q. You did not listen to the testimony?

A. I did not.

[fol. 50] Q. And you state that had there been colored people on these juries, you would have known about it prior to 1950?

A. That is correct.

Q. Do you know a Henry McGlothlin in Maury County?

A. (The witness only mumbled in reply.)

Q. Pardon?

A. No, I don't.

Q. All right. Do you know a Jim Amis — J-i-m A-m-i-s?

A. Jim Amis? I know one Jim Amis.

Q. From the rural Fifth District of Maury County?

A. I know a Jim Amis from Culleoka. I don't know if that's the Fifth District, or not?

Q. That is correct. That is the Fifth District.

You do know Jim Amis?

A. I know a Jim Amis.

Q. And you would have known had he been in the jury box, would you not? If his name had been in the jury box, you would have known that. Is that correct?

A. I would have know if he had been on the jury.

Q. Oh! Are you making a distinction between the people who actually sit in the jury box and the people who are available for jury duty—that is, whose names are in the jury box?

A. I'm not making a distinction between anyone. I'm only stating that I know.

[fol. 51] Q. What is it that you know about Negroes on the jury in Maury County?

A. I haven't seen any—I haven't heard of any before that time.

Q. Do you mean that you have never heard of any sitting on a jury?

A. That's correct.

Q. You don't have any knowledge one way or the other whether the names of Negroes are in the jury panel, do you? I mean in the large pool of names from which the jurors are drawn by a ten-year old boy under the law.

A. I haven't seen a ten-year-old boy draw those, so I wouldn't know.

Q. So you do not know whether or not their names are in the jury panel. Is that correct?

A. That is correct.

Q. If this Jim Amis' name had been in the jury panel, would you have known that?

A. The only way I would have known—if they were seated on the jury—if they called their names and placed them on the jury; I would have known.

Q. So your testimony is only related purely to the men who actually sit in the jury box or on the grand jury?

A. So far as I know, yes.

[fol. 52] Q. Rather than the names of people who are available for jury duty?

A. I haven't heard of any being available.

Q. Do you know Henry English of Culleoka?

A. Yes.

Q. Would you know if his name was in the jury panel?

A. I wouldn't know of any name in the jury panel unless I saw them in the jury box.

Q. What about Walter Braden? Do you know Walter Braden?

A. No, I don't.

Q. Pardon?

A. No; I don't.

Q. What about Jesse Braden?

A. I don't know him.

Q. Archie Crosby?

A. I know him.

Q. V. K. Greenfield?
A. I never heard of him.
Q. Ed Brown?
A. I never heard of him.
Q. Charley Harrison?
A. I know him.
Q. John W. Joyce?
A. I know Joyce.
Q. A. M. Cobble?
[fol. 53] A. Who?
Q. A. M. Cobble—C-o-b-b-l-e?
A. I never heard of him.
Q. Rufus Vestal?
A. I know him.
Q. Will Matthews?
A. I don't know him.
Q. You do not know him?
A. No.
Q. Toby Armstrong?
A. I know one Armstrong. I think his name is Toby.

MR. SANDIDGE: If your Honor please, I am going to object to his interrogating this witness about whether he knows every member of the Negro race of Maury County.

MR. DAVIES: This witness has qualified himself as an expert on Colored affairs in Maury County, if your Honor please.

THE COURT: He says he does not know anything unless they were seated in the box, that he would not know anything about it. That is the way I construe his testimony.

MR. DAVIES: All right, sir.

BY MR. DAVIES:

Q. Let me hurry through these names and ask you if you ever heard of or seen any of these people seated in the box.

[fol. 54] THE COURT: He says he has never heard of any.

MR. DAVIES: Any, all right, sir.

THE COURT: Regardless of what their names are.

MR. DAVIES: All right, sir.

BY MR. DAVIES:

Q. Now, you say—and this was in 1949—that one third of the population of Maury was Colored. Is that approximately correct?

A. Approximately.

Q. What part of that is female and what part is male?

A. Now, I couldn't actually say what part is female and what part is male.

Q. What part is under 21, and what part is over 21?

A. The last statistics that we got back along then, it was a third Colored. The rest was White. We got a slip from the registration of voters in order to get the voters. We got a third. Now, it didn't specify how many was under and how many older. It just said a third.

Q. How many freeholders or householders?

A. I couldn't say how many freeholders or householders.

Q. That's correct.

A. I said I couldn't answer that.

Q. In what districts of the county did these people come from?

[fol. 55] A. All districts.

Q. I beg your pardon?

A. Different districts of the county—Fourth, Fifth, Sixth.

Q. Did each district have one third Colored?

A. No.

Q. How many districts are there in the county?

A. I believe it's—I think it's twelve districts in our county.

Q. Twelve districts?

A. I think it is. I'm not accurate on that.

Q. Do you know the qualifications for jurors as they existed in 1949?

A. I think I do.

Q. What were they please?

A. You are supposed to be a property owner or landowner, free, and a reasonable education.

Q. Over 21?

A. That's right.

Q. Freeholder, householder, over 21. Is that correct?

A. Yes, sir.

Q. Yet you do not know how many are freeholders, how many householders, how many are male. Is that correct?
A. I can't answer that question. I don't know.
A. All right.
MR. DAVIES: Nothing further.

[fol. 56] RESPONDENT'S PROOF

TESTIMONY OF PAUL F. BUMPUS

DIRECT EXAMINATION

[Tr. p. 93]

BY MR. DAVIES:

Q. This is Assistant Attorney General Paul Bumpus. Is that correct?
A. Yes, sir.
Q. Paul F. Bumpus?
A. Yes, sir.
Q. Where do you live, General Bumpus?
A. I live in Nashville now.
Q. How long have you lived in Nashville?
A. Since 1950.
Q. I believe that your present position is Assistant Attorney General for the Davidson County Attorney General's office.
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. What was your profession before coming to Davidson County or occupation?
[fol. 57] A. I was a lawyer and District Attorney General in the Columbia Circuit which consisted of four counties.
Q. And during what period of time were you so employed?
A. 1935 til 1950.
Q. I believe that we have discussed this case previously—
A. Somewhat.
Q. —in your office. Is that correct.
A. Yes, sir.

Q. Are you familiar with or do you have an independent recollection of the case of Brooks Lee Anderson?

A. No, sir; I don't.

Q. Did you try many or few cases during this time?

A. Quite a few.

Q. General Bumpus, this particular defendant was tried in the Circuit Court for Maury County in August of 1949. Would you relate, if you will please, sir, what the practice was for the selection of grand and petit juries at or about this time and specifically whether or not Negroes were included or excluded on the jury panels?

A. In Maury County during the 15 years that I was in office there, the practice was to select the grand jurors and the petit jurors in the identical same way; that is, they had a Jury Commission there who, approximately [fol. 58] every two years, would put names of prospective jurors in the jury box. And then they had three—

Q. Do you know from what source these names were taken?

A. Yes, sir. Chiefly from the tax books of Maury County, and those tax records did not show whether the taxpayer was white or whether he was Negro.

Q. All right, sir.

A. So, unless the jury commissioner just happened to know the individual personally, they would not know the race of the individual whose name they put into the jury box for future jury duty.

And they had three terms of the Circuit Court every year. Of course, down there the criminal cases are tried in the Circuit Court as are the civil cases.

Q. Yes, sir.

A. And the practice was during the 15 years of my service there—insofar as I know, it still is—that some ten days or two weeks before each term of court, the Jury Commissioners would assemble and draw out a certain number of names, the number that they considered to be necessary for that term of court. And those jurors were to serve both on the grand jury and the petit jury. I don't mean that the same one would serve on both, but the names were drawn for both purposes.

Q. There was one pool from which both—

[fol. 59] A. That's right. They were drawn for both, and then they would all be summoned to appear on the first day of the term of court, and the first— They kept the same foreman, incidentally, from term to term. So that left 12 more to be chosen for the grand jury, so the first 12 out of the entire assembled jurors would be chosen for grand jury duty, and the others would serve as petit jurors.

Q. Now, direct your answer specifically to whether or not there were colored people summoned in on this entire jury panel from which the petit jury and the grand jury were subsequently selected?

A. Yes, sir. They would— They would appear at practically every term of court as far as I can remember, but they wouldn't serve because they would all ask to be excused. They weren't willing to serve, and they wanted off.

Q. Did you yourself observe that colored prospective jurors would from time to time ask to be excused?

A. Many, many times. And frequently they would have letters from their employers asking that they be excused, that they were needed badly at work.

Q. All right, sir.

A. First one excuse and another. They would ask off. I don't remember that I ever saw one serve on a jury in Maury County. They may have since I left.

[fol. 60] Q. All right, sir. Specifically in regard to this period, August 1949, this May term of court, I believe it was, did that same practice prevail at that time?

A. Yes, sir.

Q. And prior to that time also?

A. Yes, sir.

Q. Were you involved in the somewhat famous or infamous case as the case may be of Kennedy versus the State?

A. Yes, sir. I prosecuted that case.

Q. Was there not a plea in abatement filed in the trial court in regard to the systematic exclusion of Negroes from the grand and petit juries?

A. Yes, sir.

Q. I believe that that plea in abatement was denied, and dismissed by the trial judge. Is that correct?

A. Yes, sir.

Q. And was appealed to the Supreme Court of Tennessee?

A. Yes, sir.

Q. Conviction was affirmed on appeal?

A. Yes, sir.

Q. That is a reported case. Is that correct?

A. Yes, sir.

Q. And I believe the Supreme Court of the United States denied certiorari.

[fol. 61] A. That's correct.

Q. When did this occurrence take place if you recall?

A. The occurence took place in January of 1946, and the hearing of the plea in abatement and the trials—We had two trials for the different phases of the case. One case was tried in Lawrenceburg on a change of venue, and the Kennedy case was tried in Columbia. It required most of the year. I think we tried the Kennedy case in November.

Q. Was a good bit of testimony taken in the trial court in regard to this allegation of the systematic exclusion of Negroes?

A. Yes, sir. It was a tremendous record.

Q. Do you recall ever seeing this petitioner before?

A. I don't remember. I don't remember him. I don't remember the case. No doubt I prosecuted it, but I don't remember it because I just had one Assistant for the four counties, and he worked with the grand jury most of the time. It's possible—probable that I prosecuted it. I don't recall. We had so many cases down there and in the other counties, too.

MR. DAVIES: You may ask him.

CROSS EXAMINATION

BY MR. SANDIDGE:

Q. Were there any Negroes on the jury that convicted this man?

[fol. 62] A. I'm sure there were not. I don't remember any—

Q. Were there any Negroes on the grand jury that returned the indictment against this man?

A. I'm sure there were not.

Q. Why are you sure?

A. Because, as I stated a while ago, I can't remember ever serving with the grand jury down there in Maury County with a Negro on it, but I know they would appear. There would be some asked to serve at practically every term of court, and they would beg off.

Q. During the 15 years—from 1935 til 1950—that you were there, General Bumpus, were there any Negroes that served on the criminal or petit juries.

A. I don't remember any actually serving on any.

Q. Were there any Negroes that served on any grand jury during that period of time?

A. I don't remember any that served, but they were summoned to both—petit and grand juries—at every term of court.

Q. They would beg off?

A. They would beg off; yes, sir.

Q. Why? What were the reasons that they would give to the judge, or would the judge require them to give any reason?

A. There would be various reasons as I mentioned a while ago. Sometimes they would have letters there from [fol. 63] their employers asking that they be excused because they were so badly needed in their work. And on many other instances—in many other instances they would just say that they didn't want the responsibility of serving; and they would ask not to serve.

Q. These letters from their employers—the employers were white people, were they not?

A. They could have been either. I don't know. I don't have any specific instance in mind.

Q. Most people in Maury County who employ other people are white people, are they not?

A. No, sir; no, sir. They have— There are numbers —many, many Negroes in Maury County who have em-

ployees themselves. I would say the majority would be white, but I wouldn't say most of them would be.

Q. But you can't— Other than the work end of it, that was about the only reason they gave. Is that right?

A. Yes, that would be— Well, of course, they would have other reasons. They would say it was inconvenient, and ask the judge to let them off, and he would do it. And he would let off the white people who would ask to be off, too. Many of them did.

Q. Actually they really hadn't stated a reason for them to be excused from jury duty on any of these grounds, had they?

[fol. 64] A. I didn't understand the question.

Q. I say actually they haven't stated any grounds on any of these that you stated that they would use that would exclude them. Inconvenience is not any ground, is it?

A. Well, it is discretionary with the Court. It's discretionary with the Court to excuse a juror, under the state law, if—

Q. And the Court—

A. May I finish my answer?

Q. Yes, sir.

A. The state law itself provides that, if it will seriously handicap or injure a person's business, that is a ground to be excused on. Some of them would be over age. If they are over 65 years of age, they are entitled to be excused legally under the statute in this state. Some of them would have that excuse. They would have various excuses.

Q. But the judge would accept these excuses of inconvenience and so forth?

A. Yes, sir; he would, both as to Negroes and white. He was very understanding.

Q. But no Negroes, during the time that you were there, ever served on any of these juries—grand or petit?

A. I don't remember any that ever served, but I know many, many were summoned to serve.

MR. SANDIDGE: That's all.

[fol. 65]

AFFIDAVIT OF JUDGE JOE M. INGRAM

[p. 1]

RE: BROOKS LEE ANDERSON VS.
LYNN BOMAR—WARDEN
UNITED STATES DISTRICT COURT
CIVIL ACTION NO. 3569

TO THE HONORABLE JUDGE OF SAID COURT:

This Statement and Affidavit is made pursuant to 28 U.S.C.A. Section 2245 and at the request of Ed R. Davies, Special Counsel, and may be filed in the above cause and presented at the Hearing which is scheduled for Tuesday, July 7, 1964.

The numbers used in this Statement in reply to the various allegations will be the same as set forth in the letter of June 19, 1964, from Mr. Davies and therefore may not correspond numerically with the numbers set forth in said Petition.

The undersigned is the duly elected, qualified Judge of the 11th Judicial Circuit of Tennessee and has been continuously since September 1, 1942. As such Circuit Judge he presides over the Criminal Court in Maury County and therefore was the presiding Judge at the trial of Brooks [fol. 66] Lee Anderson, the Petitioner, at the time of his conviction of the charge of rape on August 1, 1949, in Case No. 5112, and sentenced to confinement in the State Penitentiary for 49 years and 1 day.

* * * *

[p. 2]

7 and 9. The allegation that Negroes were systematically excluded from service on the Grand Jury and Petit Jury at the time of this trial is utterly false and without any foundation. The undersigned personally knows that since 1942 until the present time, Negroes have not been systematically excluded from service on the Grand Jury and Petit Jury in this county. In the first place, the Judge of this Court would not name Jury Commissioners that would engage in any such practice and I personally

know that at the date of this trial, Negroes had been selected and named and placed in the Jury Box for Jury Service. They certainly have not been excluded or refused service on Juries by the Court because of their race or color and from time to time many have been drawn from the Jury Box to serve on Juries and many members of the Colored Race have served on both the Grand and Trial Juries and, as a matter of fact, during the past few years at almost every term of our Circuit Court, Negroes have served on both the Grand Jury and Trial Jury.

The reason the undersigned is so emphatic and positive about this matter is the result of a trial of the so-called [fol. 67] race riot cases that were tried in this Court in 1946. At that time, the Defendants were represented by the N.A.A.C.P. Appointed Attorneys Thurgood Marshall, Z. Alexander Lobby, a Dr. Branson, an attorney of Washington, D.C. and Maurice Weaver of Chattanooga, Tennessee.

Counsel for the Defendants filed a Plea in Abatement to the Indictments in these cases alleging among other things that Negroes were systematically excluded from service on the Grand Jury that returned the indictments. The Court spent some two weeks or more hearing proof on this matter and it was established at that hearing that this charge was false, that there had been no systematic exclusion of Negroes from Jury service at that time and consequently the Plea in Abatement was overruled. In one of these cases, No. 4712, State vs. Lloyd Kennedy, was tried on November 11, 1946, motion for a new trial was overruled and sentence pronounced on December 6, 1946 and the case appealed to the Supreme Court of Tennessee.

The Supreme Court of Tennessee affirmed this conviction and found that there was no error in the Trial Court's action in overruling said Plea in Abatement and later this action was approved by the Supreme Court of the United States when certiorari was denied. I did not mean to digress so much about this matter but Mr. Davies [fol. 68] advises in his letter that A. J. Morton of Morton Funeral Home in Columbia, Tennessee, has been subpoenaed by Petitioner for the purpose of proving the sys-

tematic exclusion of Negroes from Jury duty in Maury County at the time of this trial in 1949. Mr. Morton was one of the Defendants in the so-called race riot cases and as such was present in Court at the time it was shown in 1946 that this allegation is untrue.

The Jury Commission of Maury County met in July, 1948, and at that time selected and deposited in the Jury Box 1501 names to make up the Grand and Trial Jury list for the next two-year period and from which Jury Box names were drawn by lot for each term of Court to make up and form the Grand Jury and Trial Jury (for two years) from that time and it was from this list of 1501 names so selected by the Jury Commission in July, 1948, that the Grand Jury was formed that indicted Brooks Lee Anderson on May 23, 1949, and the Trial Jury that tried this Defendant on August 1, 1949.

The Court has no recollection of how many, if any, Negroes were drawn from the Jury Box that made up the Grand and Trial Juries for the May, 1949, term of the Circuit Court, but a casual examination of the Jury Commission's records on file in the office of the Circuit Court Clerk of this County (the Circuit Court Clerk is also Clerk of the Jury Commission) reveals that many [fol. 69] names of persons selected and placed in the Jury Box at that time for jury service were members of the Colored Race.

For example, in the rural 5th District of this County, which is the home district of the undersigned, the following Colored persons were placed on the Jury rolls by the Jury Commission in its July, 1948, meeting and placed in said Jury Box. Their names are as follows:

Jim Amis
Henry English
Walter Braden
Jess Braden

District 9 contains the following persons selected by the Jury Commission and placed in the Jury Box that are personally known by the undersigned to be members of the Negro Race:

Archie Crosby
V. K. Greenfield
Ed Brown
Charlie Harrison
John W. Joyce
A. M. Cobble
Rufus Vestal
Will Matthews

[fol. 70] Toby Armstrong 10th District

District 7 contains the following names personally known by the Court to be members of the Colored Race:

Charlie Chavers
Ed Driver
Perry Dudley
Max Fleming
Henderson Hylick
Maxie Perryman
Jordan Townes
Joe Worley
Walter Woodson

So, therefore, the undersigned personally knows that there was no systematic exclusion of members of the Colored Race from Jury service in this County at the time of the trial of the Petitioner.

* * * * *

[p. 6]

This, the 4th day of July, 1964.

/s/ JOE M. INGRAM

[fol. 71]

DEPOSITION OF PRIDE TOMLINSON, JR.

DIRECT EXAMINATION

BY MR. DAVIES:

[Dep. p. 2]

Q. Is this Mr. Pride Tomlinson, Jr.?

A. Yes, sir.

Q. Mr. Tomlinson, I believe you are an attorney of Columbia, Tennessee, is that correct?

A. Yes.

Q. I further believe that you have been asked to testify on behalf of the respondent in this habeas corpus proceeding, is that correct?

A. Yes.

* * * *

[Dep. p. 3]

Q. Now, Mr. Tomlinson, in 1947—pardon me—1949, did you have occasion to represent the petitioner, Brooks Lee Anderson, in a trial in Maury County?

A. I represented Brooks Lee Anderson, by Court appointment, the record shows it was 1949, I have no independent recollection of the date.

* * * *

[fol. 72]

[Dep. p. 12]

Q. All right sir. Now, Mr. Tomlinson, there have been certain charges made in the petition in regard to the systematic exclusion of negroes from the Grant and Petit Juries in Maury County at the time of Anderson's trial —rather indictment, trial and conviction in 1949. At that time, would you state how the Grand Juries and Petit Juries were selected, if you know? What the procedure was?

A. I can't tell you any personal experience as to how the jury was at that time selected, but they generally take them from the tax rolls, I presume by a Jury com-

missioner, and summoned to be there the first day of each term.

Q. Were you present at some times when these juries were selected?

A. Yes, most of the time.

Q. All right, sir. How was a prospective juror chosen for the Grand Jury, and how was he chosen for the Petit Jury, what was the procedure adopted by the Court after the names had been submitted to the Court?

A. The procedure is the same now as it was then, I believe. The names of all of the people that had been subpoenaed for jury duty—that their names were called and then they—slips were put in a hat or some other container and drawn one by one, and the Grand Jury was first [fol. 73] selected and when it was duly constituted, the—I don't know whether it was before or after they were charged, but then the rest of the prospective jurors were chosen for Petit Jury service, trial jury service, I don't mean all of them—

Q. Is it fair to say then that all of the prospective jurors were somewhat locked in a pool, and the Grand Jurors were taken out first and then the Petit Jurors were chosen from them—

MR. SANDIDGE: I'm going to object to first; leading question, and second Mr. Davies determining what is fair or not in selecting the jury.

MR. DAVIES: Well, I think my question speaks for itself, go ahead and answer it.

A. I think you stated it correctly as to how they are selected—were selected.

Q. Now in 1949, both before and at the time of Anderson's trial, were there negroes who were members of this general pool, who were there on call and subject to selection either to the Grant or Petit Jury?

A. Yes, sir. I can't testify of course about this particular group, but they commenced appearing in the Jurors list, those who were subpoenaed for service, I would say about after 1947.

Q. How is it that you picked that particular date?

[fol. 74] A. We had racial disorders in Maury County about the time we had a very long trial as a result of

that and I pinpoint it from that date, that negroes were called for jury duty.

Q. When you say—

A. They were called and appeared and selected, how they got there I don't know.

Q. And when you say—

A. And were offered for selection.

Q. All right sir, and that would be either on the Grand or on the Petit Jury, since both of these juries were selected at the same time.

A. They were there for that purpose, now, there weren't always negroes on the jury. As a matter of fact there were very few of them—back then.

Q. All right sir. Now, there are certain allegations made in your petition—let me ask you this, before we get into that. Have you any explanation to offer as to why there were very few negroes selected on either the Petit or the Grand Jury at that particular time. What was the reason, if any?

A. Strictly an opinion—would be strictly an opinion—I do recall—

MR. SANDIDGE: I'm going to, of course, enter an objection.

[fol. 75] MR. DAVIES: Go ahead and answer.

A. I have seen negroes more often than average white people ask the Judge that they would be excused.

Q. You've seen this yourself?

A. Yes, and he would generally excuse them.

* * * *

CROSS EXAMINATION

BY MR. SANDIDGE:

* * * *

[Dep. p. 21]

Q. Now then, about negroes in Maury County, in 1947, that's the date of the famous "Mink Slide" cases?

A. Yes, you might call them that. It was about that date, yes, sir.

Q. Those cases, they were tried, I believe, by Mr. Looby of this city and a Mr. Marshall represented a lot of the defendants?

A. Mr. Weaver from Chattanooga and another lawyer from Washington.

Q. And those cases, I believe, went to the Supreme Court, didn't they? One of them did?

A. I was not in those cases, Mr. Sandidge. Of course, like everybody in the community, I knew what was going on.

[fol. 76] Q. And rather than bring up the question of whether the negroes were or were not being excluded systematically, they went off on another question?

A. I don't know, sir.

Q. You don't know?

A. You would have to consult the record on that.

Q. All right,—

A. There were two of those cases. One was tried in Lawrence County, and one was tried in Maury County. There was a change of Venue in the first trial from Maury to Lawrence, and the second batch was tried in Maury County, I believe.

Q. But you don't know the question of—I'm speaking of the Supreme Court of the United States, about what they finally went off on?

A. Wasn't any occasion for the Supreme Court to rule on it. These negroes were acquitted.

Q. That's right, but they went off on some other point?

A. The jury acquitted them, in the Lawrenceburg cases.

Q. They did?

A. Yes.

Q. Do you know what they did in the Columbia Cases?

A. I believe there was a conviction there for some minor offense, I'm not positive.

Q. Anyway, up until 1947, it is your testimony that negroes were not serving on the jury in Maury County, is that right?

[fol. 77] A. I would say that is correct, yet.

Q. Now between 1947 and 1950, how many negroes served on juries, if you know?

A. Very few.

Q. Do you know of any negroe ever serving on the Grand Jury during that period of time?

A. I have no recollection of it.

Q. Were there any negroes on the Grand Jury, that returned this indictment against Brooks Lee Anderson?

A. Not that I know of, I don't know whether there was or was not.

Q. Were all the 12 men on this jury that convicted him white?

A. Yes, I feel sure that's the case.

Q. Were there any negroes that were called, that got in the box and were challenged?

A. I don't know, I doubt it.

Q. Were there any negroes on the entire jury panel—the petit jury panel, from which his jury was picked?

A. I don't know that. There was negroes appearing in the Courthouse as the result of being summoned for jury duty, about that time.

Q. Do you know what percentage were appearing—of the total number—

A. No sir, it would be a small percent.

[fol. 78] Q. You don't know the exact number?

A. No, sir. Sometimes there would be 3 and sometimes 2.

Q. And you said the judge would excuse most of them, is that right?

A. I recall some instances in which the negroes—negroe prospective jurymen would request to be excused and the judge would excuse them.

Q. At the negroes request?

A. Yes.

Q. Do you recall what the usual request was?

A. I recall some of them—I hate to use the word, "usual" Mr. Sandidge, but I'm speaking of my own observation, but I have seen in that group the negroes—the prospective jurymen, ask the Court to be excused, some would give a reason and some would give no apparent reason.

Q Well, were they otherwise qualified?

A. As far as I know.

Q. And you say, I believe you testified that you had not had to exercise your judgment about whether you wanted to select a juror, leave a negroe that's been called?

A. How's that again?

Q. I believe you testified that you had not had to exercise any judgement that you may have on whether you might want a jury—a negroe on your jury—on any cases, whether or not to take a juror, that you never had to exercise any judgement you may have—

[fol. 79] A. Oh, yes. I had negroes on juries. But the question was in a criminal case, where I was representing a negroe defendant. I have had a lot of law suits where there were negroes on the jury and selected without a challenge.

Q. And this is since—since 19—what?

A. I'd say within the last 10 to 12 years. It's more common now than it was in those days.

Q. Now, you say the list of prospective jurors, that's made up from the tax rolls?

A. I'd hate to testify about something that I don't have anything to do with.

Q. Back in those days, we're talking about.

A. Yes, I know. I hesitate to answer that because I don't know of my own personal knowledge.

Q. You don't know how the jurors—

A. I think that the way they were selected, from the tax rolls.

A. And then you said something that the names were called, slips were put in a hat, the slips pulled out and the names were called?

A. Yes, sir.

Q. This would be in open court, is that right?

A. Yes.

Q. You're talking about after they subpoenaed the people whose names they were going to put in the hat, is that right?

A. That's right.

[fol. 80] Q. You're not testifying as to how they got up the subpoena list of the people they subpoenaed from to sit in the courtroom, to wait until—

A. No, sir. You'll have to get that information from somebody else.

Q. All right.
A. I have thoughts about it.

* * * *

[fol. 81]

REDIRECT EXAMINATION

BY MR. DAVIES:

* * * *

[Dep. p. 39]

Q. Now, out of the panel, the entire panel of jurors from which Grant and Petit Jurors were summoned in 1949, there were certain members of the negroe race, is that correct sir. Regardless, if there were any on this particular jury?
A. If my recollection serves me correctly, yes sir.

[fol. 82]

DEPOSITION OF FLO F. FLEMMING

DIRECT EXAMINATION

[Dep. p. 2]

BY MR. DAVIES:

Q. Is this Mr. Flo Flemming?
A. Yes, sir.
Q. What is your full name?
A. Flo F. Flemming.
Q. And where do you presently reside?
A. I reside in Columbia and Nashville.

* * * *

[Dep. p. 3]

Q. When were you sheriff in Maury County?
A. '46 through '56.
Q. Do you remember the circumstances—
A. (Interposing) '52, I'm sorry.
Q. '52?
A. Yes.

* * * *

[fol. 83]

CROSS EXAMINATION

[Dep. p. 6]

BY MR. SANDIDGE:

Q. Are you a native of Maury County?

[fol. 84] A. Yes, sir.

Q. Have you lived there all your life?

A. Well, time in the service, in and out different places, contracting and so forth.

Q. I mean, have you maintained your residence there?

A. Well, I'd say I've maintained my voting status and I've always considered Maury County my residence.

Q. What is your age?

A. Pardon?

Q. What is your age?

A. Forty-two.

Q. Do you know, of your own knowledge, if any Negroes ever served on a jury in a criminal trial in Maury County during 1950 or at any time prior to that?

A. No, sir, I don't.

Q. You don't know, or—

A. (Interposing) Of any.

Q. That has ever—

A. (Interposing) They have never served.

[fol. 85] MR. DAVIES: You are speaking about being seated in the box?

MR. SANDIDGE: Do you want to bring that out later?

MR. DAVIES: I am asking you a question on your question.

MR. SANDIDGE: I'm not under oath.

MR. DAVIES: I believe I can trust your testimony.

MR. SANDIDGE: Well, let me reframe my question again to the witness. That's what you want me to do?

MR. DAVIES: Yes.

Q. I believe the way that I framed that question, Mr. Flemming was—do you know, of your own knowledge, if any Negroes have ever served on a jury in Maury County, in a criminal trial?

A. No, sir, to my knowledge, they haven't.
Q. Do you know, of your own knowledge, if any Negroes have ever served on the Grand Jury in 1950 or prior in Maury County?
A. No, sir, to my knowledge, I don't know of any.
MR. SANDIDGE: That's all.

[fol. 86]

DEPOSITION OF LARCE M. WHITE

DIRECT EXAMINATION

[Dep. p. 2]

BY MR. DAVIES:

Q. Is this Mr. Larce M. White?
A. Yes, sir.

* * * *

[Dep. p. 3]

Q. When were you in Maury County, Tennessee?
A. Left there in 1950.
Q. And were you a native of Maury County, Tennessee?
A. Yes.
Q. I believe that it is correct, sir, you were a deputy sheriff on the Sheriff's Force there for some period, is that correct?
A. Yes, sir.
Q. And duing what period were you so employed?
A. '46 to '50.
Q. Who was the sheriff?
A. Flo F. Flemming.

* * * *

[fol. 87]

CROSS EXAMINATION

BY MR. SANDIDGE:

* * * *

[Dep. p. 13]

Q. And you are a native of Maury County?
A. Yes, sir.

Q. Did your duties require you to be in Judge Ingram's court very much?

A. Not very much, no, sir.

Q. Did you see many or few Criminal Court trials in Judge Ingram's Court?

A. I would say quite a few. I don't know what you would call many or few.

Q. You would term it quite a few?

[fol. 88] A. Yes, sir, I would term it quite a few in the four years I was there.

Q. Were they trials where juries were sitting in the box?

A. Yes, sir.

Q. Did you ever see a Negro sitting on any of these juries?

A. No, sir.

MR. DAVIES: You mean sitting in the jury box?

MR. SANDIDGE: Yes.

THE WITNESS: No, sir, not at that time, no, sir.

Q. In 1950 and prior thereto, did you ever see a Negro sitting on the jury?

A. No, sir.

Q. Are you familiar with the Maury County Grand Jury?

A. Not now I'm not.

Q. Were you then?

A. I was at the time that I was working there, yes, sir.

Q. 1950 and prior, any time prior to that, did you ever see any Negroes on the Maury County Grand Jury?

A. No, sir.

MR. SANDIDGE: That's all.

[fol. 89] OPINION AND ORDER OF
UNITED STATES DISTRICT COURT

(November 10, 1964)

* * * * *

The petitioner herein was tried, convicted and sentenced to forty-nine years and one day for the crime of rape in the Circuit Court of Maury County, Tennessee,

on March 20, 1950. Petitioner is now incarcerated in the Tennessee State Penitentiary. In the instant action he seeks habeas corpus relief, alleging that he is being detained in violation of his constitutionally guaranteed liberties by virtue of the following acts or occurrences:

* * * *

(5) that negroes were systematically excluded from the grand jury which indicted him and the petit jury before which he was tried.

[fol. 90]

* * * *

(5) Petitioner has failed to establish a prima facie case of purposeful discrimination or exclusion of qualified negroes from the grand and petit juries of Maury County during 1949. Petitioner introduced census reports which purported to establish that the population of Maury County during the period in question was twenty-five per cent negro. He then introduced testimony of several witnesses who said that they were unable to recall that any negroes had served on the grand or petit juries during that time. They further testified that there were qualified negroes living in the county at that time. (It is to be noted that one of the witnesses who testified that there were qualified negroes who could have served on the jury did not even know what the qualifications for jury duty were.)

In order to establish sufficient ground for relief, it must be shown that there was a purpose to discriminate. Mere racial imbalance will not suffice. *Akins* v. *Texas*, 325 U.S. 398. While petitioner introduced evidence as to the [fol. 91] percentage of negro population in Maury County in 1949, he did not establish with any certainty what proportion of the negro population would qualify for jury duty. Against the testimony of the individuals who were unable to recall any negroes serving on the juries during the period in question, defendant has offered the highly credible testimony of three participants in the 1949 trial, including the trial judge, the Honorable Joe M. Ingram. Pride Tomlinson, Jr., who served as petitioner's attorney, and Attorney General Paul Bumpus both testified that

during 1949 negroes were in fact subpoeaned for jury duty in Maury County, but in most cases they requested to be excused and such requests were honored.

Judge Ingram testified that negroes had not been excluded from jury duty since 1942 in Maury County. Upon examining the jury commissioner's record, Judge Ingram was able to identify not less than twenty-two negroes who were members of the jury panel at the time of petitioner's trial. Under these circumstances, it is clear that the petitioner has failed in his effort to establish a pattern of exclusion of negroes from jury duty in Maury County during 1949.

* * * *

[fol. 92] For the reasons herein stated, the Court is of the opinion that the petition is without merit and that same should be, and is hereby, denied.

/s/ WM. E. MILLER
United States District Judge

[fol. 93]

NOTICE OF APPEAL (November 23, 1964)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

No. 3569

BROOKS LEE ANDERSON

vs.

WILBURN C. JOHNSON, WARDEN,
TENNESSEE STATE PENITENTIARY, NASHVILLE, TENNESSEE

NOTICE OF APPEAL

Notice is hereby given that Brooks Lee Anderson, Petitioner above named, appeals to the Court of Appeals for the Sixth Circuit the final judgment entered in this action on the 10 day of November, 1964, against the petitioner.

This the 23 day of November, 1964.

/s/ KENT SANDIDGE, III
KENT SANDIDGE, III
Solicitor for Petitioner
American Trust Building
Nashville, Tennessee
256-4176

[fol. 94]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16533

BROOKS LEE ANDERSON, PETITIONER-APPELLANT

v.

WILBURN C. JOHNSON, WARDEN, TENNESSEE STATE PENITENTIARY, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division

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Decided December 22, 1966.

Before PHILLIPS, Circuit Judge, and MCALLISTER and CECIL, Senior Circuit Judges.

PHILLIPS, Circuit Judge. This is an appeal from the order of the district court denying appellant's petition for a writ of habeas corpus.

Appellant, a Negro, was tried in the Circuit Court of Maury County, Tennessee, in 1949, under an indictment charging him with the crime of rape of a girl under fifteen years of age. The jury returned a verdict of guilty and fixed his sentence at forty-nine years and one day. Details as to appellant's previous criminal record and his personal history are set forth in the dissenting opinion of Judge McAllister.

In his trial in the State court appellant was represented by Mr. Pride Tomlinson, Jr., a leading member of the Maury County Bar, as court-appointed counsel. This attorney filed a motion for a new trial, which later was

[fol. 95] dismissed on appellant's own application made in open court. Appellant is now serving his sentence in the Tennessee Penitentiary.

The District Judge, the Honorable William E. Miller, conducted a thorough evidentiary hearing in the habeas corpus proceeding. Appellant was represented capably in the district court by Mr. Kent Sandidge, III, of the Nashville Bar as court-appointed counsel. Prior to the hearing in this court Mr. Sandidge had been appointed Assistant United States Attorney and was permitted to withdraw as counsel for appellant. Thereupon, this court appointed Mr. James O. Bass, Jr., and Mr. J. Brad Reed of the Nashville Bar as counsel for appellant. These attorneys have filed a comprehensive brief and made an able oral argument before this court.

Two questions are raised on this appeal: (1) that a confession was elicited from appellant subsequent to his arrest and before indictment, after his request to see a lawyer had been denied, relying upon *Escobedo* v. *Illinois*, 378 U.S. 478; and (2) that Negroes were systematically excluded because of their race from the grand jury which indicted appellant and from the petit jury which convicted him, in violation of his rights under the equal protection clause of the Fourteenth Amendment.

I.

Appellant previously filed a habeas corpus proceeding in the State courts, but did not raise the *Escobedo* question in that proceeding. This issue was presented for the first time in the district court in the present case. The district judge correctly ruled that appellant has failed to exhaust his State remedies and that the district court would not consider his claim for relief based on that issue. 28 U.S.C. § 2254.

It is now settled that neither *Escobedo* v. *Illinois*, *supra*, nor *Miranda* v. *Arizona*, 384 U.S. 436, would apply retroactively to this case, which was tried in 1949. *Johnson* v. *New Jersey*, 384 U.S. 719. Further, since appellant's contention is premised upon a denial of his right to counsel, [fol. 96] and no question is made in this court as to the

voluntariness of his confession, *Davis* v. *North Carolina*, 384 U.S. 737, is not applicable.

We accordingly hold that no relief on the issue of denial of the right to counsel is available to appellant in this case.

II.

Both the grand jury which indicted appellant and the petit jury which returned a guilty verdict against him were composed entirely of members of the white race. We now turn to the contention that Negroes were excluded systematically from the grand jury and the petit jury, in contravention of appellant's rights under the Fourteenth Amendment. This contention is based upon a principle of constitutional law long since firmly established. *Strauder* v. *West Virginia*, 100 U.S. 303.

In *Carter* v. *Texas*, 177 U.S. 442, 447, the Supreme Court said:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U.S. 303; *Neal* v. *Delaware*, 103 U.S. 370, 397; *Gibson* v. *Mississippi*, 162 U.S. 565."

In *Norris* v. *Alabama*, 294 U.S. 587, 589, the court said:

> "[A]lthough the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination."

[fol. 97] The "rule of exclusion" has been applied to prohibit discrimination against any delineated class. *Hernandez* v. *Texas*, 347 U.S. 475, 480. Briefly stated, the

rule is: proof that Negroes constitute a substantial segment of the population of the jurisdiction, that some Negroes are qualified to serve as jurors, and that none of them have been called for jury service over an extended period of time establishes a prima facie case of systematic exclusion of Negroes from jury service. *Norris* v. *Alabama*, 294 U.S. 587; *Smith* v. *Texas*, 311 U.S. 128; *Hill* v. *Texas*, 316 U.S. 400; *Cassell* v. *Texas*, 339 U.S. 282; *Ross* v. *Texas*, 341 U.S. 918; *Labat* v. *Bennett*, 365 F.2d 698 (C.A. 5).

It is equally well settled that a member of a racial group has no constitutional right to be tried by a jury composed proportionately of members of his own race. In *Swain* v. *Alabama*, 380 U.S. 202, 208, the Court said:

> "A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. *Virginia* v. *Rives*, 100 U.S. 313, 322-323; *Gibson* v. *Mississippi*, 162 U.S. 565; *Thomas* v. *Texas*, 212 U.S. 278, 282; *Cassell* v. *Texas*, 339 U.S. 282. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. 'Obviously, the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible.' *Cassell* v. *Texas*, 339 U.S. 282, 286-287 (opinion of Mr. Justice Reed, announcing judgment)."

In *Thomas* v. *State of Texas*, 212 U.S. 278, 282, the Court stated that:

[fol. 98] "It was ruled in *Martin* v. *Texas*, 200 U.S. 316, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, and that an accused person cannot of right demand a mixed

jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race. And it was said 'What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the impanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color.' ".

District Judge Miller made a finding of fact that there was no purposeful exclusion of qualified Negroes from the grand and petit juries in Maury County, Tennessee, in 1949, including the following:

"Petitioner has failed to establish a prima facie case of purposeful discrimination or exclusion of qualified negroes from the grand and petit juries of Maury County during 1949. Petitioner introduced census reports which purported to establish that the population of Maury County during the period in question was twenty-five per cent negro. He then introduced testimony of several witnesses who said that they were unable to recall that any negroes had served on the grand or petit juries during that time. They further testified that there were qualified negroes living in the county at that time. (It is to be noted that one of the witnesses who testified that there were qualified negroes who could have served on the jury did not even know what the qualifications for jury duty were.).

"In order to establish sufficient ground for relief, it must be shown that there was a purpose to discriminate. Mere racial imbalance will not suffice. *Akins* v. *Texas*, 325 U.S. 398. While petitioner in-
[fol. 99] troduced evidence as to the percentage of negro population in Maury County in 1949, he did not establish with any certainty what proportion of the negro population would qualify for jury duty. Against the testimony of the individuals who were unable to recall any negroes serving on the juries during the period in question, defendant has offered the highly credible testimony of three participants in the 1949

trial, including the trial judge, the Honorable Joe M. Ingram. Pride Tomlinson, Jr., who served as petitioner's attorney, and Attorney General Paul Bumpus both testified that during 1949 negroes were in fact subpoenaed for jury duty in Maury County, but in most cases they requested to be excused and such requests were honored.

"Judge Ingram testified that negroes had not been excluded from jury duty since 1942 in Maury County. Upon examining the jury commissioner's records, Judge Ingram was able to identify not less than twenty-two negroes who were members of the jury panel at the time of petitioner's trial. Under these circumstances, it is clear that the petitioner has failed in his effort to establish a pattern of exclusion of negroes from jury duty in Maury County during 1949."

"Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case." *Patton* v. *Mississippi*, 332 U.S. 463, 466.

"Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that [limitation of negroes] type of discrimination." *Akins* v. *Texas*, 325 U.S. 398, 401, rehearing denied, 326 U.S. 806.

The standard of review in this case, as in other civil cases tried by a district judge sitting without a jury, is that the findings of fact of the district judge will not be [fol. 100] set aside unless they are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure.

"Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions, should not be exercised without clear evidence of violation." *Brown* v. *Allen*, 344 U.S. 443, 482, rehearing denied, 345 U.S. 946.

The applicable Tennessee statutes relevant to the qualification of jurors which were in effect in 1949 at the time of appellant's conviction were as follows:

"Every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this Code." Williams Tenn. Code, Sec. 10006. (Subsequently substantially changed — see T.C.A. Sec. 22-101.)

Incompetent persons. "Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors." Williams Tenn. Code, Sec. 10009; now T.C.A., Sec. 22-102.

Occupational and disability exemptions.

"The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state; service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state." Williams Tenn. Code, Sec. 10010; now T.C.A., Sec. 22-103.

[fol. 101] Excuse from service. "Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when, for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance." Williams Tenn. Code, Sec. 10011; now T.C.A., Sec. 22-104.

Disqualification by interest or relationship. "No person can act as a juror in any case in which he is interested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by the civil law, except by consent of all the parties." Williams Tenn. Code, Sec. 10007; now T.C.A. Sec. 22-105.

In 1949 there was in effect a private statute applicable to Maury County, which governed the method of selecting lists of prospective jurors. The act, which created a county board of jury commissioners, provided that:

"Sec. 5. Be it further enacted, That it shall be the duty of the Jury Commissioners biennially on the first Monday in July, or upon the call of the Chairman, upon any day within thirty days thereafter, to meet and select from the tax books of the county and from any reliable sources the names of upright, intelligent men, known for their integrity, fair character, and sound judgment, from the various civil districts of the county and in proportion to the population of such districts, as near as may be, possessing the qualifications as required by law . . ." Chapter 45, Private Acts of Tennessee, Extra Session, 1913.

The list selected from the tax books by the jury commissioners numbered approximately 1500. The tax books of Maury County did not designate the race of the persons listed thereon. Shortly before each term of court, all of the names on the jury commissioners list were placed in a [fol. 102] box and a number of them (approximately 100) were drawn as prospective members of the jury panel for that term. These persons whose names were drawn were summoned for jury duty for the next succeeding term and either served or were disqualified or excused by the judge.

In Maury County the relevant census figures were as follows:

	1940	1950
Total Population	50,357	40,368
White	30,225 (66.5%)	31,782 (72.2%)
Negro	10,130 (33.5%)	8,579 (27.8%)

The figures as to males over 21 were as follows:

White	8853 (66.9%)	9470 (73.7%)
Negro	2918 (33.1%)	2486 (26.3%)

The State trial judge who presided over the criminal trial of appellant was the Honorable Joe M. Ingram, who has served as judge of the Eleventh Judicial Circuit of Tennessee continuously since September 1, 1942. The following affidavit of Judge Ingram was filed in the record in the district court in the present case:

> "This Statement and Affidavit is made pursuant to 28 U.S.C.A. Section 2245 and at the request of Ed. R. Davies, Special Counsel, and may be filed in the above cause and presented at the Hearing which is scheduled for Tuesday, July 7, 1964.
>
> * * * *
>
> "The undersigned is the duly elected, qualified Judge of the 11th Judicial Circuit of Tennessee and has been continuously since September 1, 1942. As such Circuit Judge he presides over the Criminal Court in Maury County and therefore was the presiding Judge at the trial of Brooks Lee Anderson, the Petitioner, at the time of his conviction of the charge of rape on August 1, 1949, in Case No. 5112, and sentenced to confinement in the State Penitentiary for 49 years and 1 day.
>
> [fol. 103] "The allegation that Negroes were systematically excluded from service on the Grand Jury and Petit Jury at the time of this trial is utterly false and without any foundation. The undersigned personally knows that since 1942 until the present time, Negroes have not been systematically excluded from service on the Grand Jury and Petit Jury in this county. In the first place, the Judge of this Court would not name Jury Commissioners that would engage in any such practice and I personally know that at the date of this trial, Negroes had been selected and named and placed in the Jury Box for Jury Service. They certainly have not been excluded or refused service on Juries by the Court because of

their race or color and from time to time may have been drawn from the Jury Box to serve on Juries and many members of the Colored Race have served on both the Grand and Trial Juries and, as a matter of fact, during the past few years at almost every term of our Circuit Court, Negroes have served on both the Grand Jury and Trial Jury.

"The reason the undersigned is so emphatic and positive about this matter is the result of a trial of the so-called race riot cases that were tried in this Court in 1946. At that time, the Defendants were represented by the N.A.A.C.P. Appointed Attorneys Thurgood Marshall, Z. Alexander Looby, a Dr. Branson, an attorney of Washington, D.C. and Maurice Weaver of Chattanooga, Tennessee.

"Counsel for the Defendants filed a Plea in Abatement to the Indictments in these cases alleging among other things that Negroes were systematically excluded from service on the Grand Jury that returned the indictments. The Court spent some two weeks or more hearing proof on this matter and it was established at that hearing that this charge was false, that there had been no systematic exclusion of Negroes from Jury service at that time and consequently the Plea in Abatement was overruled. In one of these cases, No. 4712, State vs. Lloyd Kennedy, was tried on November 11, 1946, motion for a new
[fol. 104] trial was overruled and sentence pronounced on December 6, 1946 and the case appealed to the Supreme Court of Tennessee.

"The Supreme Court of Tennessee affirmed this conviction and found that there was no error in the Trial Court's action in overruling said Plea in Abatement and later this action was approved by the Supreme Court of the United States when certiorari was denied. I did not mean to digress so much about this matter but Mr. Davies advises in his letter that A. J. Morton of Morton Funeral Home in Columbia, Tennessee, has been subpoenaed by Petitioner for the purpose of proving the systematic exclusion of Negroes from Jury duty in Maury County at the time

of this trial in 1949. Mr. Morton was one of the Defendants in the so-called race riot cases and as such was present in Court at the time it was shown in 1946 that this allegation is untrue.

"The Jury Commission of Maury County met in July, 1948, and at that time selected and deposited in the Jury Box 1501 names to make up the Grand and Trial Jury list for the next two-year period and from which Jury Box names were drawn by lot for each term of Court to make up and form the Grand Jury and Trial Jury (for two years) from that time and it was from this list of 1501 names so selected by the Jury Commission in July, 1948, that the Grand Jury was formed that indicted Brooks Lee Anderson on May 23, 1949, and the Trial Jury that tried this Defendant on August 1, 1949.

"The Court has no recollection of how many, if any, Negroes were drawn from the Jury Box that made up the Grand and Trial Juries for the May, 1949, term of the Circuit Court, but a casual examination of the Jury Commission's records on file in the office of the Circuit Court Clerk of this County (the Circuit Court Clerk is also Clerk of the Jury Commission) reveals that many names of persons selected and placed in the Jury Box at that time for jury service were members of the Colored Race.

[fol. 105] "For example, in the rural 5th District of this County, which is the home district of the undersigned, the following Colored persons were placed on the Jury rolls by the Jury Commission in its July, 1948, meeting and placed in said Jury Box. Their names are as follows:

Jim Amis
Henry English
Walter Braden
Jess Braden

District 9 contains the following persons selected by the Jury Commission and placed in the Jury Box that are personally known by the undersigned to be members of the Negro Race:

Archie Crosby
V. K. Greenfield
Ed Brown
Charlie Harrison
John W. Joyce
A. M. Cobble
Rufus Vestal
Will Matthews

Toby Armstrong 10th District

"District 7 contains the following names personally known by the Court to be members of the Colored Race:

Charlie Chavers
Ed Driver
Perry Dudley
Max Fleming
Henderson Hylick
Maxie Perryman
Jordan Townes
Joe Worley
Walter Woodson

"So therefore, the undersigned personally knows that there was no systematic exclusion of members of the Colored Race from Jury service in this County at the time of the trial of the Petitioner.

"*This, the 4th day of July, 1964.*

/s/ Joe M. Ingram"

[fol. 106] The case of *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132, cert. denied, 333 U.S. 846 (1947), which is referred to in the affidavit of Judge Ingram, involved the question of whether there was a systematic exclusion of Negroes from juries in Maury County in 1946. The opinion of the Supreme Court of Tennessee states that approximately eleven hundred pages of the record in that case were devoted to testimony on this question. The Supreme Court of Tennessee said:

"It should be borne in mind that members of the Negro race have no constitutional right to trial by a

mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries. The testimony of the jury commissioners is to the effect that when they placed the names of seven hundred and fifty or more taxpayers in the jury box for subsequent drawing, they were not aware as to the race of a great many of the persons whom they placed therein, but undertook to select a proportionate number of such persons from the various civil districts of the county without regard to their race. That this must be true is evidenced by other testimony in the record. A Negro teacher called by the defendant testified that he was summoned for jury duty at a time previous to the impanelment of the grand jury that indicted the defendant and was excused from jury service at his own request. The evidence further shows that at the November term 1946, at which defendant was tried, one Negro appeared for jury service and was present awaiting such until the entire panel of some fifteen members was excused by the trial judge. The evidence also shows that one member of the colored race, Henry McGlothlin, was on a list of jurors drawn from the jury box in drawing a panel to select the petit jury for the trial of this case. The proof shows that these names which were drawn from the box were placed therein by the jury commission in July, 1944, or more than a year and a half before the commission of the alleged crime in this case." 186 Tenn. at 317-18.

[fol. 107] The findings of the State court on the issue of discrimination, although not binding on the court, are entitled to great respect. *Pierre* v. *Louisiana*, 306 U.S. 354, 358.

Mr. Paul F. Bumpus, who served as district attorney general in Maury County from 1935 through 1950, testified that Negroes were summoned and appeared for jury duty "at practically every term of court as far as I can remember" but they generally were not willing to serve and asked to be excused; that "frequently they would have letters from their employers asking that they be excused,

that they were needed badly at work." Attorney-General Bumpus did not recall having seen a Negro serve on a jury in Maury County prior to 1949.

Mr. Pride Tomlinson, Jr., who represented appellant as court-appointed attorney at his trial in 1949 testified that Negroes were included in calls for jury duty in Maury County, particularly following certain racial troubles that occurred there in 1946, but that they frequently were excused for duty on their own applications. Mr. Tomlinson did not recall having seen a Negro serving on a jury in the county prior to 1949, but testified that many Negroes have served and continue to serve on juries in the county since that time.

Appellant asserts that at the time of his trial and conviction in Maury County, Tennessee, there were three steps in the selection of jury panels:

(1) The selection from the tax books of the large list of names of prospective grand and petit jurors by Maury County's board of jury commissioners;
(2) The selection from the jury commissioners' large list of a smaller list, which list made up the prospective grand and petit jurors for a particular term of court;
(3) A narrowing of this smaller list by disqualification or by the judge's excusing from service persons summoned therefor.

[fol. 108] On the basis of the evidence introduced in the district court, appellant now concedes that there was no systematic exclusion in the first two steps. Therefore if systematic exclusion of Negroes did in fact take place it would be the result of step three, i.e. either by disqualification or by the judge excusing from service persons summoned therefor.

In *Swain* v. *Alabama*, 380 U.S. 202, 226-227, the Court said that:

> "Total exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be

> woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service. Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State."

Likewise, the excusing of summoned Negro jurors from service upon their own application and for cause does not necessarily constitute systematic exclusion on account of race.

The fact that no Negro served on the grand jury that indicted appellant or on the petit jury that convicted him, coupled with the further fact that no witness testifying in the present case could recall having seen a Negro serving on a jury in Maury County prior to 1949, would have established a prima facie case of systematic exclusion, except for other evidence in the record. Under the evidence hereinabove outlined, and especially in view of the detailed affidavit of Judge Ingram, we cannot say that the findings of fact of the district judge in the present case are "clearly erroneous."

Judge Ingram's affidavit was introduced into evidence under the authority of 28 U.S.C. 2245, which provides that:

[fol. 109] "On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence."

To the extent that the affidavit of Judge Ingram contained statements as to matters which took place other than at the trial, we are of the opinion that it was properly admissible under the provisions of 28 U.S.C. 2246:

> "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound

written interrogatories to the affiants, or to file answering affidavits."

The record in the present case discloses that, after the filing of the foregoing affidavit, the district judge allowed counsel for appellant fifteen additional days in which to propound written interrogatories or further questions to Judge Ingram, or to obtain a supplemental affidavit from him.

Although issues of fact in a habeas corpus case may not be established by ex parte affidavits alone, *Walker* v. *Johnston*, 312 U.S. 275, 287, *Jones* v. *Cunningham*, 313 F.2d 347, 349 (footnote 4, C.A. 4), cert denied, 375 U.S. 832, the procedure followed by the district court in the present case was in accord with the statute and would be calculated to help maintain a desirable relationship between State and Federal courts. Both the Circuit Judge presiding over the State court in Maury County, Tennessee, and the United States District Judge for the Middle District of Tennessee are judges with original general jurisdiction. It was fitting and proper that Judge Ingram not be called to testify as a witness in federal court [fol. 110] so long as the rights of appellant were protected. The rights of appellant were protected amply under the facts of the present case, in that his court-appointed attorney was accorded an opportunity to cross-examine Judge Ingram by interrogatories and to obtain a supplemental affidavit.

We hold that the findings of fact of the district court are not "clearly erroneous."

The judgment of the district court is affirmed.

This court takes this occasion to express its appreciation and thanks to Mr. James O. Bass, Jr. and Mr. J. Brad Reed of the Nashville bar, who, acting under appointment of the court as counsel for appellant, undertook the laborious preparation of this case on review, and submitted excellent briefs and arguments on the difficult issues presented.

McALLISTER, Senior Circuit Judge, dissenting. Appellant, Brooks Lee Anderson, a Negro, was convicted by a

jury, in the Circuit Court of Maury County, Tennessee, of the crime of rape of a girl under fifteen years of age.

The jury fixed the sentence at forty-nine years and one day. Such a heavy sentence may have been imposed because of appellant's record. He was born in 1912. In 1929, at the age of seventeen, he was arrested for housebreaking and larceny in Maury County, and committed to the State Training and Agricultural School for three years; and, as of the time of his hearing on the petition for habeas corpus on July 7, 1964, he testified that he had been in jail or prison practically all of the time since 1929 for housebreaking, concealing stolen property, and other offenses, including the sentence he was then serving for rape of an under-age girl. The deputy sheriff who assisted in arresting him testified: "I didn't want to mistreat him. As far as I was concerned, this was a case — a kind of case that his own people was trying to indict him [fol. 111] and I wasn't trying to do nothing to him. It wasn't nothing to me. He was a [trusty] around there [at the jail after his arrest]. That's a fellow that's permitted to be on the outside of the jail — maybe locked up at hours in the night. He used to help around the kitchen and maybe helped inmates inside. The best I can remember about him, he was always a nice, quiet fellow. He never caused any trouble."

Another deputy sheriff who had assisted in taking appellant's alleged confession said that, while at the jail, appellant "probably went to the store or different places to get things for us, but he never gave any trouble that I know of. In fact, I always thought Brooks was a pretty good boy there."

At the time of the hearing on the petition for the writ of habeas corpus in the District Court, appellant was fifty-two years old, and had served fifteen years of his sentence, with thirty-four more years to serve. If he lives and serves his full sentence, he will be eighty-six years old when he is released.

Appellant's confession, which he afterward repudiated, was to the effect that after he had drunk half a pint of whiskey, and when he was wandering on a path through some bushes, and saw the girl with whom he afterward had sexual relations, as the jury found, he had a revolver

in his hand, and the confession stated that when the girl saw the gun, she "must have gotten scared" and "she begged me not to hurt her."

After he was convicted, appellant filed a motion for a new trial, which was dismissed at his own request. About thirteen years later, while serving the prison sentence imposed upon him, he filed a petition for a writ of habeas corpus in the Criminal Court for Davidson County, Tennessee, which was denied without a hearing, and, on appeal to the Supreme Court of Tennessee, the order denying the petition for a writ of habeas corpus was affirmed on May 8, 1963.

On August 31, 1963, appellant filed a petition for a writ of habeas corpus in the United States District Court [fol. 112] for the Middle District of Tennessee, setting forth that his rights under the federal Constitution were violated on the ground that Negroes were systematically excluded from the jury that convicted him in the Circuit Court for Maury County, and that a confession which he had signed and which was used in his trial was illegally obtained, since he had been deprived of the right of seeing a lawyer, which he had asked for, after his arrest and prior to his indictment.

After a full evidentiary hearing in the District Court, Judge William E. Miller denied the writ on the ground that appellant had failed to establish a prima facie case of purposeful discrimination or exclusion of qualified Negroes from the grand and petit juries of Maury County during the year of his trial; that the question of the claimed unlawfully obtained confession was raised for the first time in the District Court; that appellant had failed to exhaust his state remedies with regard to such issue, and that the District Court was without power to consider his claim for the relief based thereon.

The only issues raised by counsel for appellant, on this appeal, are:

> (1) Whether the confession elicited from appellant, after refusal of his request for counsel, was, because of the refusal of such request, obtained in violation of his rights guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of

the United States, and that the confession was, therefore, inadmissible in the state trial which resulted in his conviction; and

(2) Whether Negroes were systematically excluded, because of their race, from the grand jury which indicted appellant, and from the petit jury which convicted him, in violation of his rights guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

With regard to the question of the confession which it was claimed had been illegally obtained, because appellant [fol. 113] had not been allowed to consult with a lawyer beforehand, it was agreed by both appellant and appellee that this question had been raised for the first time in the habeas corpus proceedings before the District Court. Judge Miller found that appellant had failed to exhaust his state remedies with regard to this issue, and that the court was without power to consider his claim for relief based thereon. Title 28 U.S.C.A. Section 2254.

Appellant contends that, under *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), the undisputed testimony of appellant that he was refused the right to consult with a lawyer, which he had requested, prior to signing the confession, is proof of the violation of appellant's right to counsel guaranteed by the Sixth Amendment, and made mandatory upon the states by the due process clause of the Fourteenth Amendment, and that the confession was, therefore, clearly inadmissible.

Appellant maintains that *Escobedo* v. *Illinois, supra,* should operate retroactively to protect his constitutional right to counsel. *Miranda* v. *Arizona,* 384 U.S. 436, furthermore delineated procedures to safeguard the Fifth Amendment privilege against self-incrimination during in-custody interrogation, holding that an accused who wishes to consult with counsel, cannot be questioned; that he must be warned prior to any questioning that he has the right to remain silent; that anything he says may be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to

any questioning, if he so desires. *Escobedo* and *Miranda*, however, apply only to trial begun after the decisions in those cases were announced.

In *Johnson* v. *New Jersey*, 384 U.S. 719, 731, the Court said:

> "We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involun- [fol. 114] tariness of the resulting confessions. See *Haynes* v. *Washington, supra; Spano* v. *New York, supra.* Prior to *Escobedo* and *Miranda*, however we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See *Crooker* v. *California*, 357 U.S. 433 (1958); *Cicenia* v. *Lagay*, 357 U.S. 504 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. This is in favorable comparison to the situation before *Mapp* v. *Ohio*, 367 U.S. 643 (1961), where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf* v. *Colorado*, 338 U.S. 25 (1949).
>
> "At the same time, retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."

The trial in the instant case took place in 1949. In *Davis* v. *North Carolina*, 384 U.S. 737, 740, 741, the Court said:

> "We have also held today, in *Johnson* v. *New Jersey, ante*, p. 719, that our decision in *Miranda*, delineating procedures to safeguard the Fifth Amendment privilege against self-incrimination during in-custody interrogation is to be applied prospectively only. Thus the present case may not be reversed

solely on the ground that warnings were not given and waiver not shown. As we pointed out in *Johnson*, however, the nonretroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). This Court has undertaken to review the voluntariness of statements obtained by police in [fol. 115] state cases since *Brown* v. *Mississippi*, 297 U.S. 278 (1936). The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1, 6-8 (1964).

"The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. *Haynes* v. *Washington* 373 U.S. 503, 510-511 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568, 610 (1961); *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949). See also *Gallegos* v. *Colorado*, 370 U.S. 49, 54, 55 (1962). Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary."

In the instant case, we have before us no issue as to whether the confession was voluntary. It is true that it was attempted by appellant at the hearing on the petition for habeas corpus in the District Court to show that the confession was not voluntary; but subsequent evidence in-

troduced by the Government was, apparently, so convincing to appellant, that it dissipated his claim that the confession was not voluntary; and, accordingly, appellant does not now urge, on appeal, that the confession was involuntary, but only that it was elicited from him after the refusal of his request to see a lawyer subsequent to his arrest, and before indictment.

In *Johnson* v. *New York*, 384 U.S. 719, 731, the Court said that, prior to *Escobedo* and *Miranda*, few States were [fol. 116] under any enforced compulsion on account of local law to grant requests for the assistance of counsel; and this was one of the prevailing considerations in the Supreme Court's refusal to grant retroactive application of *Escobedo* and *Miranda*.

The confession made by appellant before indictment and after he had been refused counsel, is not ground for reversal, solely on the ground that appellant was not granted his request for assistance of counsel; and, aside from the question of the exclusion of Negroes from the jury, that is the only issue he presents on this appeal. Had the trial in this case come after the decisions in *Escobedo* and *Miranda*, we would be obliged, under those authorities, to reverse. But those cases do not operate retroactively.

The denial of counsel, therefore, did not by itself, render the confession inadmissible at the time of trial; and the conviction of appellant was valid as against the attack that he had been deprived of his constitutional rights, as of the time of trial, because of denial of counsel. On this issue, we prefer to base our determination thereof, on the ground, that denial of counsel, in this case, was not a deprivation of appellant's constitutional rights, because of the prospective operation only, of *Escobedo* and *Miranda* —rather than on the ground that appellant had not exhausted his remedies in the State Court.

In arriving at his conclusion that appellant was not denied his constitutional rights by systematic exclusion of Negroes from the grand jury and from the petit jury, Judge Miller reviewed the evidence taken before him on the hearing of appellant's petition for a writ of habeas corpus. He observed that such evidence showed that the census reports established that the population of Maury

County at the time of appellant's indictment and trial was 25% Negro, and that there were Negroes qualified for such jury duty living in the county at that time. He further recited that Judge Joe M. Ingram, who presided at the state court trial of appellant, filed a certificate on July 4, 1964, under the authority of Title 28 U.S.C.A. [fol. 117] Section 2245, on the habeas corpus hearing, setting forth that Negroes had not been systematically excluded from service on the grand jury and petit jury in Maury County, and that they "have not been excluded or refused service on Juries by the Court because of their race or color and from time to time many have been drawn from the Jury Box to serve on Juries and many members of the Colored Race have served on both the Grand and Trial Juries and, as a matter of fact, during the past few years at almost every term of our Circuit Court, Negroes have served on both the Grand Jury and Trial Jury."

Judge Ingram further deponed that:

> "The Jury Commission of Maury County met in July, 1948, and at that time selected and deposited in the Jury Box 1501 names to make up the Grand and Trial Jury list for the next two-year period and from which Jury Box names were drawn by lot for each term of Court to make up and form the Grand Jury and Trial Jury (for two years) from that time and it was from this list of 1501 names so selected by the Jury Commission in July, 1948, that the Grand Jury was formed that indicted Brooks Lee Anderson on May 23, 1949, and the Trial Jury that tried this Defendant on August 1, 1949.
>
> "The Court has no recollection of how many, if any, Negroes were drawn from the Jury Box that made up the Grand and Trial Juries for the May, 1949, term of the Circuit Court, but a casual examination of the Jury Commission's records on file in the office of the Circuit Court Clerk of this County (the Circuit Court Clerk is also Clerk of the Jury Commission) reveals that many names of persons selected and placed in the Jury Box at that time for jury service were members of the Colored Race.

> "For example, in the rural 5th District of this County, which is the home district of the undersigned, the following Colored persons were placed on the Jury rolls by the Jury Commission in its July, 1948, meeting and placed in said Jury Box. Their names are as follows:"

[fol. 118] He then recited the names of twenty-two members of the Negro race which had been placed on the jury rolls by the Jury Commission at its 1948 meeting.

Judge Ingram concluded his affidavit by stating:

> "So, therefore, the undersigned personally knows that there was no systematic exclusion of members of the Colored Race from Jury service in this County at the time of the trial of the Petitioner."

The statute of the State of Tennessee relating to the general qualifications of jurors which was in effect at the time of appellant's indictment, trial and conviction, was as follows:

> "Every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this Code."

A "freeholder" is one who owns real property anywhere in the state and is not confined to one who owns property in the particular county. In Maury County, the relevant census figures were as follows:

	1940	1950
Total Population	50,357	40,368
White	30,225 (66.5%)	31,782 (72.2%)
Negro	10,130 (33.5%)	8,579 (27.8%)

The figures as to males over 21 were as follows:

	1940	1950
White	8,853 (66.9%)	9,470 (73.7%)
Non-White	2,918 (33.1%)	2,486 (26.3%)

The other statutes relating to qualifications of jurors were as follows:

> "Incompetent persons.—Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors."

[fol. 119] "Occupational and disability exemptions.—The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five (65) years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state. Service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state."

"Excuse from service.—Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when, for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance."

"Disqualification by interest or relationship.—No person can act as a juror in any case in which he is interested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by the civil law, except by consent of all the parties."

These statutes governed the qualifications of jurors, both for grand and petit juries, in Maury County, Tennessee, at that time.

Concerning the method of selecting a list of prospective jurors, it appears that there was in effect at that time a private act covering Maury County, *Chapter* 45 *of the*

Private Acts of Tennessee with Extra Session, 1913. This act, creating a board of jury commissioners of Maury County, provided the following:

> "Sec. 5. Be it further enacted, That it shall be the duty of the Jury Commissioners biennially on the first [fol. 120] Monday in July, or upon the call of the Chairman, upon any day within thirty days thereafter, to meet and select from the tax books of the county and from any reliable sources the names of upright, intelligent men, known for their integrity, fair character, and sound judgment, from the various civil districts of the county and in proportion to the population of such districts, as near as may be, possessing the qualifications as required by law . . ."

The list selected from the tax books by the Jury Commissioners (hereinafter called Jury Commissioners' list) numbered 1501. The tax books of Maury County did not designate the race of the persons listed thereon. Then shortly before each term of court, all of the names on the Jury Commissioners' list were placed in a box and a number of them were drawn as prospective members of the jury panel for that term. These persons were summoned for jury duty for the next succeeding term and either served or were disqualified or excused by the judge.

Appellant, therefore, submits:

> "Thus, at the time of Appellant's indictment, trial and conviction in Maury County, Tennessee, there were three steps in the selection of jury panels from which grand and petit jurors were actually chosen:
>
> (1) The selection from the tax books of the large list of names of prospective grand and petit jurors by Maury County's board of jury commissioners;
> (2) The selection from the jury commissioners' large list of a smaller list, which list made up the prospective grand and petit jurors for a particular term of court;
> (3) A narrowing of this smaller list by disqualification or by the judge's excusing from service persons summoned therefor.

"Official action at any of these steps which would result in no, or very few, Negroes actually serving on any grand or petit jury would amount to systematic exclusion.

[fol. 121] "Appellant contends that the District Court's decision was addressed only to the first two of these three steps in arriving at jury panels from which jurors who actually served on grand and petit juries are selected. And Appellant, on the basis of the evidence introduced in the District Court, cannot quarrel with the decision on those points. However, a thorough analysis of all the evidence clearly shows that Negroes, before and at the time of Appellant's conviction, in fact were not serving on grand and petit juries in Maury County. In view of the substantial number (and percentage of the total population) of qualified Negroes, this fact can be explained *only* on the basis of systematic exclusion; any other attempted explanation too severely taxes credulity."

Many witnesses for appellant, as well as for appellee, testified, without contradiction, that prior to 1950 and up to and including appellant's trial, they had never seen or heard of any Negroes serving on a grand or petit jury in Maury County, although it appears from the testimony of the District Attorney General of Maury County, who served in that office between 1935 and 1950, that there were "many, many" Negro businessmen in that county during that time, thereby, in effect, stating that up to and including appellant's trial, many Negroes who were qualified for jury service had never served on a grand or petit jury during the period up to and including appellant's trial.

Appellant, on the basis of the foregoing testimony, contends:

"Thus, all of the evidence produced in the District Court, Appellee's as well as Appellant's, is to the effect that, at the time and prior to Appellant's indictment, trial and conviction, no Negro in the memory of any witness had ever actually served on either a

grand jury or petit jury in a criminal case in Maury County. This in a county where, according to the best available statistics, between ¼ and ⅓ of the persons qualified for jury service were Negroes. How can this be? Some of Appellee's witnesses testified [fol. 122] that Negroes asked to be excused more often than white persons. All of them? Even if this rather incredible assertion is taken as true, it would seem clear that systematic excusing equals systematic exclusion.

* * * *

"In summary, Appellant contends that the evidence admits of no interpretation except that Negroes were systematically excluded, because of their race, from the grand jury which indicted him and from the petit jury which tried and convicted him. He was thus denied the equal protection of the laws."

The uncontradicted evidence in this case is to the effect that no one had ever known of any Negroes serving as jurors on the grand jury, or on a trial in Maury County up to and including the time of the trial of appellant.

In *Eubanks* v. *Louisiana,* 356 U.S. 584, 585, Mr. Justice Black, speaking for the Court, said:

"In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. Our only concern here is with the application of this established principle to the facts disclosed by the record now before us.

* * * *

"In *Patton* v. *Mississippi,* 332 U.S. 463, 469, this Court declared, in a unanimous opinion, that 'When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group,

indictments and verdicts returned against them by juries thus selected cannot stand.' This is essentially the situation here. True, the judges now serving on the local court testified generally that they had not [fol. 123] discriminated against Negroes in choosing grand juries and had only tried to pick the best available jurors. But as Chief Justice Hughes said for the Court in *Norris* v. *Alabama,* 294 U.S. 587, 598, 'If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause]—adopted with special reference to their protection—would be but a vain and illusory requirement.' Compare *Reece* v. *Georgia,* 350 U.S. 85, 88; *Hernandez* v. *Texas,* 347 U.S. 475, 481."

In *Norris* v. *Alabama,* 294 U.S. 587, 589, Mr. Chief Justice Hughes, speaking for the Court, laid down the applicable law as follows:

"First. There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the State. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter* v. *Texas,* 177 U.S. 442, 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia,* 100 U.S. 303; *Neal* v. *Delaware,* 103 U.S. 370, 397; *Gibson* v. *Mississippi,* 162 U.S. 565.' This statement was repeated in the same terms in *Rogers* v. *Alabama,* 192 U.S. 226, 231, and

again in *Martin* v. *Texas*, 200 U.S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder* v. *West Virginia, supra; Martin* v. *Texas, supra.*

* * * *

[fol. 124] "Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson County. The testimony, as the state court said, tended to show that 'in a long number of years no negro had been called for jury service in that county.' It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County. The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had 'never known of a single instance where any negro sat on any grand or petit jury in the entire history of that county.'

"That testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees. . . ."

Swain v. *Alabama*, 380 U.S. 202, held that the exclusion of Negroes from a trial jury by the means of peremptory challenges exercised by the Prosecuting Attorney for the State is not the kind of discrimination that violates the constitutional rights of an accused to the equal protection of the laws under the Fourteenth Amendment.

The undisputed fact that no one had ever known of any Negroes serving as jurors on a trial in Maury County up to and beyond the time of the trial of appellant made out

a prima facie case of the denial of the equal protection to appellant which the Constitution guarantees.

[fol. 125] Judge Ingram's affidavit, heretofore mentioned, was introduced in evidence under the authority of Title 28 U.S.C.A., Section 2245, which provides that, on an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment, the certificate of the judge who presided at the trial resulting in the judgment, *setting forth the facts occuring at the trial*, should be admissible in evidence.

Many of the statements contained in Judge Ingram's affidavit related to facts that did not actually occur at the trial. He stated that the allegation that Negroes were systematically excluded from service on the Grand Jury and Petit Jury at the time of this trial was utterly false and without foundation. This is a conclusion, except as far as his own action goes. He also stated that he personally knew that "since 1942 until the present time, Negroes have not been systematically excluded from service on the Grand Jury and Petit Jury in this county." This is also a conclusion except as to his own action in the matter. He further stated that "the Judge of this Court would not name Jury Commissioners that would engage in any such practice and I personally know that at the date of this trial, Negroes had been selected and named and placed in the Jury Box for Jury Service." Judge Ingram might well have believed what he said of the Jury Commissioners and what he thought their conduct was, but it does not appear that he knew such fact of his own knowledge. As to Negroes having been placed in the jury box for jury service, this means only that Negroes were selected and named on the list which had been prepared, as available for duty as jurors on grand or petit juries. "Jury box" customarily means "A place set apart for the jury to sit in during the trial of a cause." Bouvier's Law Dictionary, Unabridged, Rawles Third Edition, Vol. I. As used by Judge Ingram in his affidavit, "jury box" means the box in which all of the names of available jurors, selected by the Jury Commission, were placed, and from which box such names were drawn by lot for each term [fol. 126] of court, to make up and form the grand jury and the petit jury. So that, in respect to the jury box

mentioned in the affidavit by Judge Ingram, there can be no conclusion drawn that, from all of the names selected by the Jury Commission as persons available for jurors, any of them were ever selected as grand jurors or jurors on the trial of cases, up to and including the time of the trial of appellant.

There is a further statement in the affidavit by Judge Ingram that appears to bear upon the issue. He states that: "They certainly have not been excluded or refused service on Juries of the Court because of their race or color and from time to time many have been drawn from the Jury Box to serve on Juries and many members of the Colored Race have served on both the Grand and Petit Juries, *and, as a matter of fact, during the past few years at almost every term of our Circuit Court, Negroes have served on both the Grand Jury and the Trial Jury.*" (Emphasis supplied.)

We cannot read the foregoing as a sworn statement that, of his own knowledge, Judge Ingram knew that Negroes had served on trial juries up to and including the trial of appellant; but, rather, we read it as a statement that "during the past few years," Negroes have served on grand juries and trial juries in Maury County.

Appellee relies, with respect to the issue of exclusion of Negroes from the jury that tried appellant, upon *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132, cert. den. 333 U.S. 846.

The *Kennedy* case arose from a criminal trial in Maury County at which Judge Ingram presided, in which the accused was found guilty. On appeal to the Supreme Court of Tennessee, the court said:

> "It is next insisted that the court erred in not holding that the defendant was discriminated against by the exclusion of Negroes from the grand jury.
>
> "On the hearing of the plea in abatement, the defendant introduced a number of witnesses whose testimony is that in their memory and for the past [fol. 127] fifty years, no Negro had served on either the grand or petit jury in Maury County. The State's evidence showed that Maury County operated under a jury commission law; that the jury commissioners

for the county met in July, 1944, and that they then filled the jury box by taking names from the 1943 tax books; and that these tax books contained no identifying symbols whereby the race of any taxpayer might be known. The evidence further showed that at the February 1946 term of court, at which the defendant was indicted, there was drawn from the jury box a list of one hundred and nine names to be summoned for jury service at that term of court. Of these one hundred and nine names so drawn, ten are shown to belong to the colored race. The record discloses that two of these so drawn of the colored race had died in the *interim* between July, 1944, when their names were put in the box, and the date of their being summoned for jury service; that one had removed from Maury County; and that two were actually summoned and excused at their own request. The record fails to disclose what became of the other five.

"The State concedes that a presumption of discrimination can arise from a showing that no Negroes have either been summoned for jury service or have served on grand juries for so long a period of time as to give rise to the belief that the failure is deliberate rather than accidental, but the State insists that such a presumption must yield to the undisputed facts when the question of discrimination is raised. There is no contention made of disproportionate representation of the Negro race on these panels, but the claim made is that of an utter absence of such representation.

"In *Norris* v. *Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074, 1077, the evidence showed an apparent tampering with the list from which the jury had been selected so as to evidently substitute the names of several Negroes upon such list for members of the white race. In that case the excerpt relied upon by the defendant shows that no names of Negroes were placed on the jury list.

[fol. 128] "In *Akins* v. *Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692, it was held that where the jury

commissioners placed the name of one Negro on a panel of sixteen from which the grand jury should be drawn, this fact evidenced an intent not to discriminate against members of the colored race.

"It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries. The testimony of the jury commissioners is to the effect that when they placed the names of seven hundred and fifty or more taxpayers in the jury box for subsequent drawing, they were not aware as to the race of a great many of the persons whom they placed therein, but undertook to select a proportionate number of such persons from the various civil districts of the county without regard to their race. That this must be true is evidenced by other testimony in the record. A Negro teacher called by the defendant testified that he was summoned for jury duty at a time previous to the impanelment of the grand jury that indicted the defendant and was excused from jury service at his own request. The evidence further shows that at the November term 1946, at which defendant was tried, one Negro appeared for jury service and was present awaiting such until the entire panel of some fifteen members was excused by the trial judge. The evidence also shows that one member of the colored race, Henry McGlothlin, was on a list of jurors drawn from the jury box in drawing a panel to select the petit jury for the trial of this case. The proof shows that these names which were drawn from the box were placed therein by the jury commission in July, 1944, or more than a year and a half before the commission of the alleged crime in this case.

* * * *

"It is next insisted that the lower court erred in overruling the motion to quash the panel of the petit [fol. 129] jurors upon the ground of unlawful discrimination against members of the colored race. The

record shows that from the jury box there were drawn forty-six names for the petit jury in this case, and that later the Trial Judge declared an emergency and directed the summoning of twenty-six additional veniremen or a total of seventy-two in all. Of these thirteen were summarily discharged by the trial court for ineligibility, ill health, and other valid reasons, leaving fifty-two who were actually examined as to their qualifications. Four of the fifty-nine were members of the colored race. This shows that there was no discrimination. See *Akins* v. *Texas*, *supra*. We do not think that the trial court erred in declining to quash this panel."

On the foregoing facts, the Supreme Court of Tennessee held that there was no presumption of discrimination arising from the showing that Negroes had been excluded from jury service; and this holding undoubtedly supports the contention of appellee on this appeal, for it appears that in the *Kennedy* case, it was disclosed that, although the names of Negroes had been included on the list from which grand jurors or trial jurors were selected, there was no evidence to contradict the claim of appellant therein that no Negroes had ever been known to have served on a grand or petit jury at that time.

It is emphasized that in the case of *Kennedy* v. *State*, *supra*, certiorari was denied by the Supreme Court in *Kennedy* v. *Tennessee*, 333 U.S. 846. We have, however, been told on a number of occasions by the Supreme Court that denial of certiorari means nothing as far as concerns the correctness of the judgment sought to be reviewed, even when constitutional questions are involved therein, that no Negroes had ever been known to serve on a grand or petit jury at that time.

Akins v. *Texas*, 325 U.S. 398, cited in the opinion of the Supreme Court of Tennessee in *Kennedy* v. *State*, *supra*, said:

"Petitioner's sole objection to the grand jury is that the 'commissioners deliberately, intentionally and [fol. 130] purposely limited the number of the Negro race that should be selected on said grand jury panel to one member.' Fairness in selection has never been

held to require proportional representation of races upon a jury. *Virginia* v. *Rives*, 100 U.S. 313, 322-23; *Thomas* v. *Texas*, 212 U.S. 278, 282. Purposeful discrimination is not sustained by a showing that *on a single grand jury* the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' *Hill* v. *Texas*, *supra*, 404. *Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination* and not on the theory that racial groups must be recognized. *Norris* v. *Alabama*, *supra*; *Hill* v. *Texas*, *supra*; *Smith* v. *Texas*, *supra*." (Emphasis supplied.)

The Supreme Court held, however, that in the *Akins* case, *supra*, there was no purposeful exclusion of Negroes from jury duty on the particular grand jury that indicted the defendant.

In *Arnold* v. *North Carolina*, 376 U.S. 773, petitioning Negroes who had been indicted by an all-white grand jury in North Carolina moved to quash the indictment on the ground that Negroes had been systematically excluded from grand juries in the county in which they were indicted. The state courts denied the motion to quash. On appeal, the Supreme Court, reversing the judgment, stated:

"In support of their motion to quash the indictment because of consistent exclusion of Negroes from [fol. 131] grand jury service, petitioners, both Negroes, offered testimony of the county tax supervisor showing that the tax records of the county, on which

Negro and white persons are listed separately and from which the names of jurors are derived, revealed 12,250 white persons and 4,819 Negroes in the county, with 4,485 white men and 2,499 Negro men listed for poll tax. In addition, the clerk of the trial court testified that while there have been as many as four or five Negroes upon the regular jury panel from which grand jurors have been chosen, in his 24 years as clerk he could remember only one Negro serving on a grand jury, another having been selected but excused. This evidence was uncontradicted, the State cross-examining the witnesses but offering no evidence.

"The judgment below must be reversed. The 'testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees.' *Norris* v. *Alabama*, 294 U.S. 587, 591. The situation here is quite like that in *Eubanks* v. *Louisiana*, 356 U.S. 584, 586, where systematic exclusion of Negroes from grand jury duty was found. In that case:

> "'Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory .... From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six or more Negroes were included in each list submitted to the local judges. Yet out of the 432 jurors selected only the single Negro was chosen.'"

In *Hernandez* v. *Texas*, 347 U.S. 475, the Court said:

"In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a [fol. 132] petit jury, from which all persons of his race or color have, solely because of that race or color,

been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.

* * * *

"As the petitioner acknowledges, the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized without discrimination. But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner. The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment. The Texas statute makes no such discrimination, but the petitioner alleges that those administering the law do.

* * * *

"The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that 'for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.' The parties also stipulated that 'there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.'

"The petitioner met the burden of proof imposed in *Norris* v. *Alabama*, *supra*. To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury [fol. 133] commissioners that they had not discriminated

against persons of Mexican or Latin-American descent in selecting jurors. They stated that their only objective had been to select those whom they though were best qualified. This testimony is not enough to overcome the petitioner's case. As the Court said in *Norris* v. *Alabama*:

> "'That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement.'
>
> "The same reasoning is applicable to these facts.
>
> "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."

In habeas corpus proceedings to secure the release of a Negro convicted of murder on the ground that colored persons were systematically excluded from jury duty, where, during a period of twenty years, no Negro had been on a jury list of any kind in a county, the burden was on the state's representative to refute the prima facie case developed, *United States* v. *Harpole*, 263 F.2d 71 (C.A. 5); and where Negroes were systematically excluded from a grand jury which indicted a colored defendant and from a petit jury which convicted him, the judgment of conviction was unconstitutional, subject to collateral attack, and was void. *United States* v. *Harpole*, *supra*.

[fol. 134] Although the case of *Kennedy* v. *State*, 186 Tenn. 310, holds that, because the names of Negroes were selected for the jury list and placed in the box from which grand jurors and trial jurors were selected, no discrimination can be said to result from the fact that no Negroes ever served as grand jurors or trial jurors, the Supreme Court, except for denial of certiorari in the *Kennedy* case, seems never to have decided the identical question before us. But we are of the view that, regardless of the selection of names of Negroes for the jury list from which grand jurors and trial jurors are drawn, the undisputed fact that no one had ever known of any Negroes actually serving as jurors on a trial in Maury County up to and beyond the time of the trial of appellant, made a prima facie case of the denial of the equal protection of the laws which the Constitution guarantees to appellant; and the burden was upon the state's representative to refute the prima facie case so developed, rather than upon the appellant to establish that he had been deprived of his constitutional rights.

In accordance with the foregoing, the case should be remanded to the District Court for further proceedings on the petition for the writ of habeas corpus. In such proceedings, the District Court could properly take the testimony of Judge Joe M. Ingram on all aspects of the case involving the method by which the jury list is selected, as well as the manner of selecting panels from which grand jurors and trial jurors are secured; the reasons why Negroes have not served as trial jurors up to and including the trial of appellant—all of which may have more probative force than the statement or certificate of Judge Ingram, which was not subject to inquiry by appellant's counsel; and the District Court could also properly receive further testimony from any persons, which bears upon the question whether Negroes were, or were not, improperly excluded from the jury which convicted appellant.

In this dissenting opinion, I cheerfully acknowledge the force and merit of the prevailing opinion written by Judge Phillips.

[fol. 135]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16,533

BROOKS LEE ANDERSON, PETITIONER-APPELLANT

vs.

WILBURN C. JOHNSON, WARDEN, TENNESSEE STATE PENITENTIARY, RESPONDENT-APPELLEE

BEFORE: PHILLIPS, Circuit Judge, MCALLISTER and CECIL, Senior Circuit Judges.

JUDGMENT—December 22, 1966

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded inasmuch as this appeal is In Forma Pauperis.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

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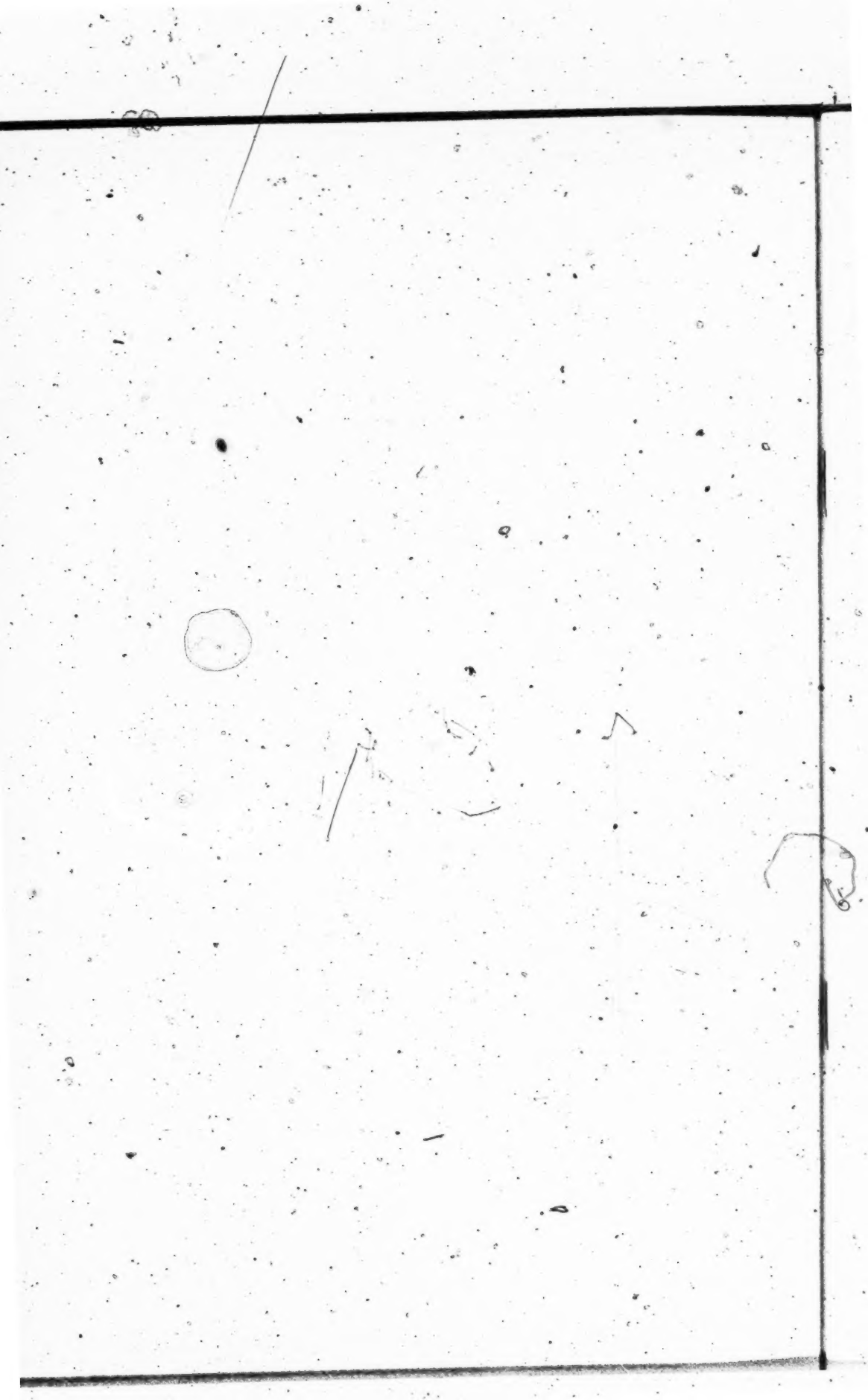

SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 700

BROOKS LEE ANDERSON,

Petitioner,

v.

WILBURN C. JOHNSON, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court for the Middle District of Tennessee is unreported. The opinion of the Court of Appeals for the Sixth Circuit is reported at 371 F.2d 84. A conformed copy of the portions of the opinion of the District Court relevant to the question presented herein is found in the Appendix heretofore filed at pp. 57-59; the opinion of the Court of Appeals for the Sixth Circuit is found in the Appendix at pp. 61-100.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for certiorari was filed on March 21, 1967, and was granted on October 9, 1967.

Constitutional Provisions and Statutes Involved

The Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 10006 of Williams' Tennessee Code of 1932, setting forth the general qualifications of jurors at the time of Petitioner's indictment, trial and conviction (1949), as follows:

> Every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this Code. Williams Tenn. Code (1932), § 10006. (Subsequently substantially changed—see Tenn. Code Ann. § 22-101.)

Sections 10007 and 10009-10011 of Williams' Tennessee Code of 1932, setting forth the grounds for disqualification for, and exemption from, jury service at the time of Petitioner's indictment, trial and conviction, as follows:

Incompetent persons.—Persons convicted of certain infamous offenses, specially designated in this Code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors. Williams Tenn. Code (1932), § 10009; now Tenn. Code Ann., § 22-102.

Occupational and disability exemptions.—The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States, or of this state; all employees of the railway mail service; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all persons over sixty-five (65) years of age, disabled by bodily infirmity, or specially exempted by any other positive law; all pharmacists registered under and in accordance with the laws of the state. Service in the national guard shall be accepted in lieu of all jury duty while actually in the military service of the state. Williams Tenn. Code (1932), § 10010; now Tenn. Code Ann., § 22-103.

Excuse from service.—Any person may be excused from serving as a juror, when the state of his own health, or that of his family, requires his absence, or when, for any reason, his own interests, or those of the public, will, in the opinion of the court, be materially injured by his attendance. Williams Tenn. Code (1932), § 10011; Tenn. Code Ann., § 22-104.

Disqualification by interest or relationship.—No person can act as a juror in any case in which he is inter-

> ested, or when either of the parties is connected with him by affinity or consanguinity, within the sixth degree, computing by civil law, except by consent of all the parties. Williams Tenn. Code (1932), § 10007; Tenn. Code Ann., § 22-105.

Chapter 45, § 5, Private Acts of Tennessee with Extra Session, 1913, setting forth the method of selection of the general venire by the Jury Commissioners of Maury County, as follows:

> Be it further enacted, that it shall be the duty of the Jury Commissioners biennially on the first Monday in July, or upon the call of the Chairman, upon any day within thirty days thereafter, to meet and select from the tax books of the county and from any reliable sources the names of upright, intelligent men, known for their integrity, fair character, and sound judgment, from the various civil districts of the county and in proportion to the population of such districts, as near as may be, possessing the qualifications as required by law . . . .

Question Presented

Whether Negroes were systematically excluded, because of their race, from the grand jury which indicted Petitioner, a Negro, and from the petit jury which convicted him, in violation of the rights secured to him by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioner was arrested in Maury County, Tennessee on April 21, 1949, upon a warrant charging him with rape. On May 23, 1949, he was indicted for rape by the grand jury of Maury County (A. 10-11). At some later date, approximately one month prior to Petitioner's trial, Pride Tomlinson, Jr. of the Maury County Bar, was appointed to represent him (A. 48). Petitioner was tried and convicted of rape on August 1, 1949 (A. 13-14).

On June 12, 1962, Petitioner filed a petition for habeas corpus in Division Two of the Criminal Court for Davidson County, Tennessee (A. 15-16), alleging, *inter alia*, a denial of the rights secured to him by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States because of the systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which tried and convicted him. This petition was denied without a hearing on December 7, 1962 (A. 17-18). An appeal to the Tennessee Supreme Court resulted in an affirmance on May 8, 1963 (A. 19).

Petitioner, on August 31, 1963, filed a petition for habeas corpus in the United States District Court for the Middle District of Tennessee, again alleging the systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which convicted him (A. 20); this allegation was repeated in an Amended and Supplemental Petition filed by his court-appointed attorney (A. 21-22). A hearing was held in the district court on July 7, 1964. In an order entered November 10, 1964, the district court held that Petitioner "failed to establish a prima facie case of purposeful discrimination or exclusion of qualified Ne-

groes from the grand and petit juries of Maury County during 1949," and that even if a prima facie case had been presented, Respondent had carried his burden and rebutted Petitioner's case (A. 57-59).

Notice of Appeal was filed in the District Court on November 23, 1964 (A. 60). A hearing was held in the Court of Appeals for the Sixth Circuit on April 19, 1966; and on December 22, 1966, an opinion was entered affirming the judgment of the district court (A. 61-100). Phillips, J., speaking for the majority, held that a prima facie case of systematic exclusion had been presented by Petitioner but that the Court could not denominate "clearly erroneous" the district court's finding that Respondent had rebutted Petitioner's prima facie case. McAllister, J., dissented, stating that he did not think that Petitioner's prima facie case had been rebutted.

The general qualifications for jurors in Tennessee at the time of Petitioner's indictment and trial were found in § 10006 of the Williams Tennessee Code of 1932, quoted *supra* at 2; every adult male freeholder or householder was qualified, if not ineligible under the express disqualification provisions of Sections 10007 and 10009-10011, quoted *supra* at 3-4.

In July 1948 the three Jury Commissioners for Maury County selected 1501 persons who constituted the general venire for the biennium ending June, 1950 and whose names were placed on separate scrolls in the "Jury Box" (A. 46). Prior to the beginning of each term of court (there were three terms per year—A. 39), "a boy under the age of ten (10) years drew one hundred names from the Jury Box to constitute a panel" (A. 9). This panel

of one hundred persons is called the venire facias (A. 9). Between the time of selection of the 100 members of the venire facias and the beginning of the term, claims of exemption and requests for excusal were presented to the presiding judge and acted upon (A. 40, 52). Then, on the first day of the term the remaining names of the venire facias "were placed on separate scrolls and placed in a hat [and] according to law were drawn in open Court by a boy under the age of ten years" (A. 9). The first 13 names drawn constituted the grand jury. The remaining members of the venire facias were available for petit jury service during the term.

In 1940 the Negro population of Maury County was 10,130, which was 24.99 per cent of the total population; in 1950 these figures were 8,579 and 21.2 per cent (A. 23). Among adult males, there were 2,918 Negroes (24.70 per cent) in 1940 and 2,486 in 1950 (20.79 per cent) (A. 24). There was no testimony that Negroes in Maury County are any less qualified for jury service than whites. Indeed, there was testimony at the habeas corpus hearing in the district court by the man who was District Attorney General of Maury County at the time of Petitioner's indictment and trial that there was "many, many" substantial Negro businessmen in Maury County at that time (A. 42-43).

No Negro served on either the grand jury which indicted Petitioner or the petit jury which tried him (A. 41, 42, 52). All of the evidence adduced in the district court was to the effect that prior to and including the time of Petitioner's indictment and trial no Negro had *ever* served on either a grand or petit jury in Maury County, Tennessee. Such evidence included the testimony of (1) a

Negro civil rights leader in Maury County in the 1940's (A. 32, 35); (2) the District Attorney General for Maury County at the time of Petitioner's indictment and trial (A. 42, 43); (3) the attorney who represented Petitioner at his trial (A. 52, 53); (4) the Sheriff of Maury County at the time of Petitioner's indictment and trial (A. 55-56); and (5) a deputy sheriff at that time (A. 57). The Circuit Judge who presided at Petitioner's trial testified by affidavit under 28 U.S.C. 2245; he did not respond directly to the contention that no Negroes had ever actually served, but instead listed twenty-two Negroes (A. 46, 47) whose names appeared on the 1948 general venire and which he stated he had found by a "casual examination" of the general venire (A. 46).

The District Attorney General attempted to explain the fact that Negroes had never served on any grand or petit jury by saying that "they weren't willing to serve, they wanted off" (A. 40); "they would beg off" (A. 42); and the judge would excuse them even though they had no legal excuse because "he was very understanding" (A. 43). He was seconded in these assertions by Petitioner's former attorney (A. 50, 52).

Summary of Argument

Petitioner has made out a clear prima facie case by showing that no Negro had ever served on any grand or petit jury in Maury County prior to (and including) the time of his indictment and trial.

Respondent contends that the evidence does not show that any Negroes were qualified to serve as jurors. In fact,

the evidence shows that more than twenty per cent of the persons qualified were Negroes. Moreover, Respondent has the burden to show that no Negroes were qualified and has introduced no evidence on this point. Finally, if very few Negroes were qualified under the Tennessee statute, when Negroes comprised more than twenty per cent of the population, then the statute is unconstitutional.

Respondent contends that the evidence shows that there was no systematic exclusion in the selection of the general venire. In fact, the proof shows, to a mathematical certainty, that there was systematic exclusion.

The practice of the Circuit Judge for Maury County of excusing all Negroes who were summoned for jury duty, whether or not they had a legal excuse, constitutes systematic exclusion.

The case of *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), which involved the question of systematic exclusion of Negroes in Maury County in 1946, is entitled to be given no weight by this Court. It is the duty of a federal court to make an independent investigation where the violation of a federal right is claimed. Further, the Tennessee Supreme Court in *Kennedy* applied the wrong tests in reaching its conclusion, and the decision is demonstrably erroneous. And since *Kennedy* involved a different jury panel from that challenged here, its only possible relevance is of the question of whether Negroes had ever actually served; and the proof in *Kennedy* was uncontradicted that none had ever served.

Argument

It is absolutely certain that Petitioner has made out a strong prima facie case of systematic exclusion by showing that no Negro had ever served on either a grand or petit jury in Maury County prior to his indictment and conviction, and that there were none on the grand jury which indicted him nor on the petit jury which convicted him. *Coleman* v. *Alabama*, —— U.S. ——, 88 S. Ct. 2, 36 L. Wk. 3160 (Oct. 16, 1967), and cases cited therein. And "once a prima facie case is made out the burden shifts to the prosecution" (*Whitus* v. *Georgia*, 385 U.S. 545, 17 L. Ed.2d 599, 605 (1967)) to adduce evidence "adequate to rebut Petitioner's prima facie case." *Coleman* v. *Alabama, supra.*

Respondent's attempted rebuttal consists of the following contentions:

1. That Petitioner has failed to prove that there were any Negroes who met the statutory qualifications for jurors.

2. That the proof shows that the names of at least twenty-two Negroes appeared on the general venire of 1501 names selected by the jury commissioners, from which list were selected the grand jury which indicted Petitioner and the petit jury which convicted him. Respondent also questions, on a judicial admission theory, the right of Petitioner at this time to raise any question with respect to the selection of the general venire and the number of Negroes thereon.

3. That the names of Negroes in fact appeared on the venire facias of one hundred names selected each term

from the general venire; but that they always asked to be excused, which request was granted because the judge was understanding and sympathetic to such requests.

4. That this Court should follow the decision of the Tennessee Supreme Court in *Kennedy* v. *State,* 186 Tenn. 310, 210 S.W.2d 132 (1948), to the effect that there was no systematic exclusion of Negroes in Maury County some three years prior to Petitioner's indictment and trial.

Petitioner will discuss separately each of Respondent's contentions.

1. Percentage of Qualified Negroes

The relevant statutory qualifications for jury duty were that one be an adult male freeholder or householder. *Williams' Tenn. Code* § 10006 (1932). A "freeholder" is, of course, an owner of realty, *State* v. *Bryant,* 18 Tenn. 527 (1837); and a "householder" is simply the head of a family. *Hall* v. *State,* 65 Tenn. 522, 526 (1873).[1]

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[1] It is not necessary for one to be married to be a householder, nor for any children living with him to be his own. *Hall* v. *State,* 65 Tenn. 522, 526 (1873). Nor are children necessary. *Searcy* v. *Short,* 69 Tenn. 749, 751-52 (1873) [a case under a statute exempting from execution certain property belonging to the "head of a family"—the Tennessee Supreme Court has discussed decisions involving "householders" as being relevant in these cases. See, *e.g., Bachman* v. *Crawford,* 22 Tenn. 213, 216-17 (1843)]. In *Searcy* v. *Short, supra,* the Tennessee Supreme Court stated that in order to qualify as "head of a family" one must "have a family circle, that is, wife *or* child *or* other similar relations at a place of residence, within his own home or house, or in some one else's house over whom he or she exercises the control, and over which he has the direction as the head. The very idea of family is plural—carries with it the notion of more than one—and such parties occupying a peculiar social relation to each other. There must be a home, a family circle at that house of one or more under his control; that

In 1940, the total Negro population of Maury County was 10,130 or 24.99 per cent of the total population (A. 23); and the adult Negro male population was 2,918, or 24.70 per cent of the total adult male population. (A. 24) In 1950, the figure for all Negroes was 8,579, or 21.2 per cent, and for adult Negro males 2,486 or 20.79 per cent. (A. 23, 24) The Bureau of Census does not further subclassify adult males by race in any way relevant to the further statutory qualifications, freeholders or householders.

Is this proof sufficient to require a conclusion that there were many Negroes who met the statutory requirements for jury duty? Of course. The only adult males not qualified, aside from the disqualification statutes, would seem to be, generally, bachelors living alone or with someone who is not dependent on them. At any rate, it is obvious from the broad categories of the statutory qualification that the great majority of adult males of both races met such qualifications and were eligible for jury duty. Indeed, even a cursory reading of the proof shows that a basic assumption of all of Respondent's witnesses, including the presiding judge, the prosecuting district attorney and Petitioner's defense attorney, was that there were many Negroes eligible for jury service at the time of Petitioner's indictment and conviction. (A. 38-54) Petitioner contends that in the absence of proof to the contrary, this Court should presume that the percentages of adult males eligible

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home may be the occupation of an entire house, or it may be of a single room . . . ." 69 Tenn. at 751. (Emphasis added.)

Thus, in order for one *not* to be a householder, he must live alone or with persons who do not constitute a family circle of which he is the head. There is, of course, no proof, or reason to believe, that any greater percentage of adult Negro males than adult white males live in such fashion.

for jury duty, by race, are the same as those percentages of adult males, by race, *i.e.*, 20.79 per cent Negro and 79.21 per cent white (using the 1950 figures).[2]

Furthermore, since Petitioner has established a prima facie case, the burden is on Respondent to show that less than 20.79 per cent of the eligible jurors were Negro. Since he has introduced no evidence whatever on this point, that percentage must be taken as proved.

2. Selection of General Venire

In July, 1948 the Jury Commissioners of Maury County selected "from the tax books of the county and from any reliable sources the names of [1501] upright, intelligent men, known for their integrity, fair character and sound judgment . . . ." Private Acts of Tennessee of 1913 with Extra Session, C. 45 § 5. (A. 46) These 1501 men constituted the biennial general venire, from which were selected three times each year (admittedly at random) a panel of 100 names (venire facias), from which, in turn,

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[2] If we assume that there were no Negroes eligible for jury duty, or very few, the petition must still be granted; in that event the statute setting forth the qualifications for jurors would itself be invalid because violative of the Equal Protection clause of the Fourteenth Amendment: "'When a jury selection plan, *whatever it is*, operates in such a way as always to result in the complete and long continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.' *Patton* v. *Mississippi*, 332 U.S. 463, 469, 92 L. ed. 76, 80 (1947) . . . . The inclusion of a minimal or token number of Negroes on a jury list does not prevent the systematic exclusion rule from operating, for the Supreme Court has said in *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. ed. 469: 'Of course, token summoning of Negroes for jury service does not comply with equal protection . . . . [citing cases].'" *Scott* v. *Walker*, 358 F.2d 561, 571 (5th Cir. 1966). (Emphasis added.)

grand jurors and petit jurors for each term were chosen. (A. 9, 39)

Petitioner contends that from the proof in the record the conclusion is inescapable that Negroes were systematically excluded in the selection of the general venire.[3] Aside from the usual self-righteous denials, which are of no probative value, the only rebuttal evidence introduced by Respondent in an attempt to overcome Petitioner's prima facie case was the naming of twenty-two Negroes whose names appeared on the general venire.[4] As shown above, the record in this case requires the conclusion that at the time of Petitioner's indictment and conviction, 20.79 per cent of those persons eligible for jury duty were Negroes. The

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[3] Respondent has questioned whether Petitioner can now challenge the selection of the general venire because he did not press this point in the Court of Appeals. Respondent contends that this constitutes a judicial admission that there was no systematic exclusion in the selection of the general venire. But it is manifest that the doctrine of judicial admissions applies only to facts and not to legal conclusions. 9 Wigmore, *Evidence*, Judicial Admissions § 2590, 1964 Supp. at 319; *New Amsterdam Casualty Company* v. *Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963); *La Fever* v. *United States*, 257 F.2d 271 (7th Cir. 1958); *Pitcairn* v. *American Refrigerator Transit Co.*, 101 F.2d 929, 935 (8th Cir. 1939); *Faxon Hills Const. Co.* v. *United B'hd of Carpenters*, 168 Ohio St. 8, 151 N.E.2d 12, 14 (1958); *Restifo* v. *Pastor*, 129 A.2d 533, 535-36 (D.C. Mun. Ct. App. 1957); 31A C.J.S. *Evidence*, § 299 at 765, and cases cited therein. There is no authority to the contrary.

[4] Respondent contends that the record shows merely that there were *at least* twenty-two Negroes on the general venire, not that there were only twenty-two. But this completely overlooks the fact that the burden of proof is on Respondent to rebut Petitioner's prima facie case. Second, one wonders whether there is any such thing as a "casual" examination of a list of 1501 names to determine the race of those named (as was claimed to have been made by the trial judge—A. 46), especially in light of the fact that a Negro civil rights leader in the county had never heard of half of those Negroes listed by the judge as being on the general venire (7 of the 14 he was asked about—A. 34-36).

probability[5] that a random selection of 1501 names from such a population will produce no more than 22 Negroes is $.974 \times 10 - 72$, or .00000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000000974. Petitioner would respectfully suggest that the proof shows that the selection of the general venire was not random.

Respondent having offered no further explanation, the conclusion of systematic exclusion in the selection of the general venire is inescapable.

3. Excusing Prospective Negro Jurors

Respondent's proof shows that the venire facias of 100 names (which, Petitioner admits, were selected at random from the general venire of 1501 names) never contained the names of more than three Negroes[6] (A. 52). The explanation proffered by Respondent as to why no Negroes had ever served on either a grand or petit jury was that those called "would beg off" and be excused from service (A. 42-43, 40, 50, 52). To repeat, Respondent has the burden of rebutting Petitioner's prima facie case, and this can be discharged only by explaining satisfactorily the

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[5] Siegel, *Nonparametric Statistics for the Behavioral Sciences*, "The Binomal Test" at 36-42 (McGraw-Hill 1956). Counsel wishes to express his appreciation to Dr. Richard L. Gorsuch and The Vanderbilt University who generously donated his time and knowledge and its computer, respectively, to make this calculation. And see *Whitus* v. *Georgia*, 385 U.S. 545, 17 L.ed.2d 599, 605 n. 2 (1967); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

[6] This is further proof of systematic exclusion in the selection of the general venire, as set forth in 2, *supra*. Assuming that 3 per cent of the general venire were in fact Negroes (45 men, as opposed to the 22 shown by the proof), the probability of the random selection of no more than 45 Negroes in the general venire is $.42 \times 10 - 64$. *Ibid.*

reason why no Negro had ever served. Perhaps this particular "explanation" (the only one proffered) can best be handled by simply denominating it as "unsatisfactory." Moreover, even if true that this uniform excusing of Negroes occurred because the judge was "very understanding" (A. 43), serious questions are raised concerning the judiciary's responsibility in such a situation. It has certainly been true that few Negroes in rural Southern communities have gone out of their way to offend whites. And if it is generally known throughout a community in which Negroes have never served that the judge uniformly excuses Negroes from jury service even though they do not have legal grounds for being excused (A. 43), the effect upon the two or three Negroes summoned for jury service is apparent. The only step which is susceptible of judicial correction in this sequence of events resulting in non-service by Negroes is that of the excusing of prospective jurors by the judge. A rule requiring the judge to exercise his discretion so as *not* to excuse Negroes (or whites either) except where good cause is clearly established seems called for.[7]

Respondent relies on the case of *Swain* v. *Alabama*, 380 U.S. 202, 13 L.ed.2d 759 (1965), as authority for the proposition that the "systematic excusing" shown by this record does not amount to systematic exclusion. In fact, *Swain* is strong authority for Petitioner's position. There the Court clearly stated that proof of the use of the peremptory challenge (as embodied in Alabama's "struck jury"

[7] It should be noted that this line of reasoning in no way impugns the motives of the judge who receives requests to be excused. The proposed rule is simply the only practical solution to a difficult practical problem.

system) by a prosecutor over a period of time, with the result that no Negroes ever served on criminal juries,

> "might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.' These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. at 224, 13 L.ed. 2d at 774.

The Court in *Swain* merely held that proof of challenging all Negroes in a *particular* case would not support a holding of systematic exclusion.[8]

4. Kennedy v. State

Finally, Respondent asks this Court to disregard the overwhelming proof of systematic exclusion shown by this record and to follow the decision of the Tennessee Supreme Court in *Kennedy* v. *State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), *cert. denied*, 333 U.S. 846, 92 L.ed. 1129 (1948). The holding there was that there was no systematic ex-

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[8] The Court in *Swain* (380 U.S. at 224-28, 13 L.ed.2d at 775-77) also adverted to the fact that the record showed that many Negro defendants preferred all-white juries and that it was likely that Negro defendants' own attorneys also challenged prospective Negro jurors. There is a very substantial difference between the case of an attorney who, representing a Negro, uses his legal training and experience to challenge a prospective Negro juror and the case of an isolated Negro layman requesting to be excused from jury duty in a county where no Negro has ever served. The Court in *Swain* wisely noted that in systematic exclusion cases, rules should not be "woodenly applied." 380 U.S. at 227, 13 L.ed.2d at 776.

clusion of Negroes from grand or petit juries in Maury County in 1946 despite uncontroverted proof that no Negro had ever served on a grand or petit jury in Maury County.

Of course, it is the duty, not only the right, of the federal courts to make an independent determination of whether a federal right has been violated. *Norris* v. *Alabama,* 294 U.S. 587, 589-90, 79 L.ed. 1074, 1077 (1935).

Kennedy involved the 1944 general venire, and there was no proof as to the number of Negroes thereon, thus distinguishing that case from the case at bar. Moreover, since *Kennedy* involved a different general venire from the one challenged here, it would seem that its only possible relevance here would be on the question of whether Negroes had ever actually served on juries; and the uncontradicted proof in that case was that none had ever served.

The record in *Kennedy* showed that from the 1944 general venire was selected a venire facias of 106 residents of Maury County, 7 of whom (6.60 per cent) were Negroes.[9] There was no proof as to the respective percentages of Negro and White adult males eligible for jury service; therefore, as shown in 1, *supra,* it must be assumed that the percentage of Negroes eligible for jury duty was the same as that of adult Negro males, *i.e.* 24.70 per cent (using the 1940 census figures rather than those for 1950, because the selection of the general venire in *Kennedy* was in the

---

[9] The proof actually showed a general venire of 109 containing ten Negroes, but two of the Negroes were dead and one had moved away from Maury County. 186 Tenn. at 316. If a consideration of these three was proper, systematic exclusion could be easily accomplished.

Two of the seven Negroes on the venire facias were excused, and the record was silent as to the other five. *Ibid.*

first half of the decade). The probability[10] that a random selection of 106 names from such a population would produce no more than seven Negroes is .0000009944, that is less than once in a million times. Thus, the Tennessee Supreme Court in *Kennedy* held that tokenism, similar to that shown by the record in this case, satisfactorily rebutted the prima facie case of systematic exclusion; to the contrary, as shown above, the decision in *Kennedy* v. *State* is demonstrably erroneous on its own record. Therefore, even to the extent that it might be considered relevant, it is entitled to be given no weight by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to the Court of Appeals with instructions to remand it to the District Court with instructions that Petitioner be discharged from the further custody of Respondent.

J. Brad Reed
Counsel for Petitioner

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[10] See fn. 5, *supra*.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

BROOKS LEE ANDERSON,
Petitioner,
vs.
WILBURN C. JOHNSON, Warden,
Respondent.
No. 700.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

BROOKS LEE ANDERSON, Petitioner,

vs.

WILBURN C. JOHNSON, Warden, Respondent.

No. 700.

BRIEF OF RESPONDENT.

STATEMENT OF QUESTION INVOLVED.

Does the finding of the district court that the petitioner failed in his effort to establish a pattern of unconstitutional exclusion of Negroes from jury duty find support from the evidence, or is it clearly erroneous within the meaning of **Fed. R. Civ. P.** 52 (a)?

ARGUMENT.

The petitioner, a Negro man with a lengthy criminal record (R. 54-58, 66-68; A. 27-29), was convicted in Maury County, Tennessee, in 1949 for the rape of a young Negro girl (Deposition of Larce M. White, p. 11; A. 77) and was sentenced to imprisonment for 49 years and one day (A. 77). The petitioner made no complaint during the criminal proceedings concerning the alleged exclusion of qualified Negroes from jury service. There was thus no judicial inquiry made as a part of his case concerning the jury selection practices or composition of the jury venire. The issue was initially raised in the state habeas corpus proceedings, filed almost 13 years thereafter, and later raised in the instant federal petition (A. 20).

The respondent does not contend that the petitioner made an intentional and purposeful waiver of his present insistence by failing to challenge his indictment or jury in the state trial court. The petitioner was there represented by appointed counsel, a respected white member of the local bar, who was well familiar with the then recent Tennessee Supreme Court decision of **Kennedy v. State**, 186 Tenn. 310 (1946); **cert. den.** 333 U. S. 846. To have challenged the composition of the jury venire would in all probability have been fruitless in the wake of this opinion (Deposition of Pride Tomlinson, Jr., pp. 14, 21, 22). The petitioner's delay in presenting his instant complaint has adversely affected the respondent, however, because of the complications the passage of so long a period of time has presented in the marshalling of precise proof concerning the true nature of Maury County jury selection in 1949. At the time of the federal evidentiary hearing on July 7, 1964, some 15 years after the fact, two of the three jury commissioners in July of 1948 (A. 46) were dead, and the third was 90 years old and too ill to attend court (R. 104).

The instant petition presented a multitude of complaints including discrimination against Negroes in the selection of grand and petit juries. On July 7, 1964, the district court conducted a full and complete evidentiary hearing on all of these complaints. At this hearing evidence was introduced both by the petitioner and by the respondent in the form of oral testimony, depositions and affidavits. At the conclusion of the hearing opportunity was given for the taking of additional proof (R. 115, 116). The case was retained under advisement until the lower court rendered its opinion on November 10, 1964, some 4 months later.

The district court held, upon a consideration of all of the evidence, and particularly "the highly credible testimony" of three of the respondent's witnesses, that the petitioner had failed to prove a prima facie case of purposeful and intentional discrimination against Negroes in the jury selection process (A. 58).

It is to be impressed upon the Court that this decision followed a trial at which the respondent offered evidence to refute the contentions, testimony and inferences presented by the petitioner. Normally appellate considerations as to whether a prima facie case has been proven arise pursuant to a direct appellate attack following a pre-trial proceeding wherein a defendant is unsuccessful in his attempt to prove purposeful and intentional discrimination in the jury selection process and the prosecution offers no evidence on this issue. In fact, from the numerous decisions of this Court on the subject matter in question, the writer has found only one other habeas corpus case and that is **Brown v. Allen**, 344 U. S. 397 (1952). The instant case was not determined at the conclusion of the petitioner's case in chief nor upon evidence introduced only by the petitioner. The district court considered all of the proof and determined that a prima facie case of

discrimination did not exist at the conclusion of the trial. It is important to keep in mind the stage of the proceedings at which this determination was made. The appellate court affirmed, stating that the petitioner had failed to prove a prima facie case of discrimination because of the proof introduced by the respondent, and particularly the affidavit of Judge Joe M. Ingram (A. 75).

Circuit Judge Thomas F. McAllister, in his dissenting opinion, indicated that he had some question as to the admissibility and probative value of Judge Ingram's certificate. He is of the opinion that this certificate was not subject to inquiry by petitioner's counsel and that Judge Ingram should be brought into court to testify in person (A. 100).

The certificate of Judge Ingram was introduced without any objection that the testimony was in the form of an affidavit or its content beyond the scope of 28 **U. S. C.**, § 2245 (R. pp. 107-110). Petitioner's counsel did object to the admission of the certificate as being beyond the scope of the pleadings. His objection was overruled and counsel was then asked by the district judge if this was his only objection to the certificate. His answer was "Yes" (R. p. 110). Should there be some question concerning the admissibility of this certificate under the statute cited, it would also be admissible under 28 **U. S. C.**, § 2246. Further, the petitioner was specifically given an additional period of 15 days within which to propound interrogatories to Judge Ingram or to file an answering affidavit if he so desired (R. pp. 115-116). The petitioner neither requested that Judge Ingram be produced for cross-examination nor were interrogatories propounded to him concerning the points covered in his certificate, nor was an answering affidavit filed.

The proof in the district court was that Negroes constituted a substantial segment of the population of Maury

County in 1949 and prior thereto (A. 23). The proof offered by the respondent showed that an unspecified percentage of these Negroes were qualified to serve as jurors (A. 40, 42, 45-47, 49, 52, 54). There was no proof in the district court to show what percentage of the Negro population was adult or male, thus meeting the most basic of the qualifications for jury service. The petitioner sought to cure this deficiency with a second census report (A. 24) which was obtained some 10 months after the district court decision and while the cause was awaiting argument on appeal.[1] The district court did not have the benefit of this census report. No witness remembered seeing, nor did they know of a Negro actually sitting as a member of a grand or petit jury prior to the date of the petitioner's trial (A. 42, 43, 52, 53, 55-57). How then could the lower courts declare that the petitioner had failed to prove a prima facie case of discrimination? The answer is simple. The foregoing constituted only a part of the proof before the court. The petitioner does not obtain relief merely because a portion of the total evidence might, without more, have created a prima facie case. If, prior to that stage of the proceedings at which the court is required to determine the existence of a prima facie case, the respondent offers satisfactory proof in explanation of what would otherwise require a presumption of unconstitutional discrimination, what does it matter whether the court's decision is expressed in terms of failure to prove a prima facie case or as a successful rebuttal of a proven prima facie case? As a practical matter the result is the same and if the result is supported by evidence the decision is to be affirmed regardless of the legalistic reasoning or manner of expression employed by the lower courts. **Brown v. Allen,** *supra.* This is not a case coming from a state court wherein this Court is required or permitted

1 By agreement of counsel, this census report was furnished by letter dated September 30, 1965, to the Clerk of the United States Court of Appeals for the Sixth Circuit to be made a part of the record.

to re-determine the facts concerning the controverted issue of constitutionality. The standard of review in this case, as in other civil cases tried by a district judge sitting without a jury, is that neither the legal tests applied to essential findings of fact nor the findings of fact themselves will be set aside unless they are "clearly erroneous". **Fed. R. Civ. P.** 52 (a); **United States v. E. I. DuPont De Nemours & Co.**, 351 U. S. 377 (1956).

What we are really concerned with here is whether the evidence supplied by District Attorney General Paul F. Bumpus (A. 38-43), Judge Joe M. Ingram (A. 44-47) and Pride Tomlinson, Jr. (A. 48-54), was sufficient to support the judgment of the district court. The judgment must be affirmed unless this Court is prepared to state that the view of the evidence taken by the district judge was "clearly erroneous". **Fed. R. Civ. P.** 52 (a).

Mr. Bumpus testified that Negroes were summoned for jury duty at practically every term of court but would request to be excused. His experience with the system as district attorney general extended from 1935 through 1950 (A. 40-42). Mr. Tomlinson, a practicing attorney, testified that following the racial disorder which occurred in Maury County in February of 1946 (**Kennedy v. State**, *supra*, at p. 313) Negroes were regularly called for jury duty. He confirmed the fact that those Negroes subpoenaed would often ask to be excused (A. 49, 50, 52). Mr. Tomlinson began practicing law in January of 1946 (Deposition of Pride Tomlinson, Jr., p. 3). Judge Ingram is the witness whose daily experience best qualified him to testify concerning the number of Negroes actually summoned for duty and serving as veniremen. Judge Ingram testified that he personally knew that Negroes have not been excluded from jury service since 1942, and further testified that he knows that at the time of the petitioner's trial, Negroes had been selected, named, and placed on the general venire list (A. 44-47). Judge Ingram identified 22

Negroes on the list as being members of the general venire from which the juries involved in the petitioner's case were chosen (A. 46-47).. Both the district court and appellate court gave substantial weight to Judge Ingram's testimony in reaching their respective decisions (A. 58-59, 75). Judge Ingram did not testify that there were **only** 22 Negroes in the group of some 1500 veniremen. He clearly stated that he had no recollection of how many, if any, Negroes were selected for service on the grand and petit juries for the May, 1949, term but that he himself had made a casual examination of the records of prospective jurors designated by the jury commission for the period in question and from only 3 of the 10 civil districts was able to pick out the names of 22 men that he personally knew to be Negroes (A. 46-47). Notice that there was no code or indication on this jury list enabling Judge Ingram to tell Negroes from whites. The witness, James E. Morton, confirmed the fact that 7 out of 14 of the names, about which the district court permitted counsel to cross-examine, were Negroes. Mr. Morton did not dispute the fact that the other 7 were Negro but only that he did not know them (A. 34-36). Judge Ingram's check of this record was some 16 years after the fact and did not purport to cover all of the 10 civil districts in Maury County or to claim that he knew each of the some 1500 persons on the list and the race to which each belonged. It is simply not accurate to maintain that Judge Ingram testified that **only** 22 of the some 1500 persons on the list were Negroes.

The petitioner relied on the testimony of Mr. Morton to prove the extent of the Negro population of the county possessing the qualifications required of jurors, but Mr. Morton did not know what the qualifications for jury service were, did not know what proportion of the total Negro population was adult or male, and did not know what proportion of the adult Negro male population were freehold-

ers or householders (A. 37). In addition, he was asked whether many or few of the members of his race in Maury County were "qualified voters" and his answer was an inconclusive "they are" (A. 31).

Keeping in mind the fact that the district court had no evidence before it from which any sort of estimate of the number of qualified Negroes could be made, the court determined that the petitioner had not made out a prima facie case of purposeful and intentional manipulation of the jury selection process which was intended to exclude Negroes from the jury. The proof shows that the jury lists were made from the tax rolls (A. 39, 48). There is no distinction on these tax rolls between white and Negro taxpayers (A. 39) as has been present in other cases before this Court (See also **Kennedy v. State**, *supra*, at p. 316). There is no distinction made on the jury list between whites and Negroes and there is no evidence at all of any type of system of different colored tickets or dots or other type of code to differentiate white from Negro as has been before the Court in previous cases. If there was any distinction made between white and Negro in the preparation of the jury list, it could only have come from the fact that the jury commissioners may individually have known which taxpayers were Negro and which were white. This information is now lost to us because of the delay in the presentation of the complaint. It must be pointed out, however, that if the jury commissioners intentionally set about to exclude Negroes from the jury list, they were not very proficient or systematic, if you prefer, because Negroes appeared regularly at the beginning of each term in response to subpoena for jury duty (A. 40, 42, 49, 52), 10 out of the 109 member venire facias and 4 out of 59 prospective petit jurors in **Kennedy** were Negro (See 186 Tenn. at pages 316 and 319), and they missed at least 22 Negroes in the preparation of the general venire list involved in

this case (A. 46-47). Judge Ingram stated under oath that he knows that Negroes were not excluded from jury service because, for one reason, he would not appoint men who would engage in such a practice (A. 44). This is a conclusion, of course, but one deserving of consideration. This is no mere appointed official. This is a lawyer and a judge who has sworn to God that he will uphold the Constitution of the United States. He presided while some 1100 pages of testimony on this point were taken in **Kennedy**. He heard the jury commissioners testify under oath (See **Kennedy v. State**, *supra*, at pages 313 and 317). He knows the significance of an oath and the difference between a conclusion and a fact. He stated under oath that he knows that Negroes were not excluded or refused jury service at the time of the petitioner's case (A. 44-45). His conclusion is solemn, founded on proven fact, has weight, and is of significance.

The petitioner states that the evidence shows to a mathematical certainty that intentional, purposeful and systematic exclusion of qualified Negroes from jury service existed. The petitioner seeks to convince the Court through this argument either that token selection of Negroes was practiced by the jury commissioners, or that the disparity between the number of Negroes allegedly eligible and the number of Negroes appearing at Court pursuant to jury summons would only admit of the conclusion that purposeful, intentional and systematic exclusion was being practiced. The petitioner argues that the second census report, dated September 17, 1965 (A. 24), shows that 20.79% of those Maury Countians eligible for jury service were Negro, and that since the respondent introduced no evidence to refute this conclusion, it must be taken as proved. The fallacy of this argument is that the census report from which the petitioner's percentage calculations arise (A. 24) was never introduced into evidence and has never been seen by the district judge.

Why should the respondent be required to refute that which had not been proven at the conclusion of the period designated for the presentation of evidence? The basic requirements for jury service in 1949 throughout Tennessee were that a juror must be male, 21 years of age, and a freeholder or householder. **Williams, Tenn. Code,** § 10006. Even had the census report of September 17, 1965 (A. 24), been before the trial court, there was, and still is, no evidence in this record as to the percentage either of white or Negro adult males who were freeholders or householders. This is no idle contention for the proof is that the jury commissioners compiled the venire list from the tax rolls (A. 39, 48; see also **Kennedy v. State,** *supra,* at p. 316). The practice of choosing jurors from tax records is constitutional so long as the tax records do not contain racial designations. **Brown v. Allen,** *supra.* The petitioner's percentage calculations are founded upon the assumption that each adult male citizen of the county, both white and Negro, was a freeholder or householder and thus included within the tax rolls from which the venire list was taken. These calculations are further founded on the assumption that the number of qualified whites and Negroes in each of the various civil districts of the county was the same, for the commissioners were required by private act to select prospective jurors from each of the civil districts of the county in proportion to the population of such districts (**Private Acts of Tennessee, Extra Session,** Chapter 45, Section 5, 1913). We know, however, from the witness, James E. Morton, that the ratio between white and Negro citizens varied between the numerous civil districts of the County (A. 37).

The petitioner apparently advised some mathematician, who never appeared as a witness in this cause, that as a proven fact, 9,470 white and 2,486 Negro residents of Maury County were qualified as jurors and that out of

1501 qualified citizens chosen as veniremen in 1948, only 22 were Negro. From these conclusions this mathematician produced certain percentage and probability figures in an effort to prove that the jury commissioners must have manipulated the names taken from the tax rolls in such a manner so as to exclude Negroes from jury service. The writer doesn't know enough about mathematics to challenge the accuracy of this man's calculations but does remember enough of grammar school arithmetic to know that to get the answer shown in the back of the book you first have to copy the problem down correctly. If you start with an incorrect problem or premise, the result will be equally incorrect even though the mathematical mechanics be accurate. The petitioner's premises are inaccurate because there is no proof that there were only 22 Negroes out of the 1501 veniremen and even if the second census report (A. 24) is considered, there is no proof as to the number or percentage of white or Negro adult males who were in addition freeholders or householders, and thus who would have been on the tax rolls and in line for selection by the jury commissioners. Presumably it would now be possible to go back to the 1948 tax rolls and determine the race of each person included therein by either bringing them into court or by bringing in some other citizen who remembers those taxpayers no longer available. In this manner the true percentage of those white and Negro citizens possessing the qualifications for jury service could be determined. It was not felt necessary to do this in the district court, however, because it was not proved there that any specific percentage of either the white or Negro population was adult, male, or a freeholder or householder (R. 42, A. 23). The only proof in the district court was that the total Negro male, female, adult and child population constituted about one-fifth of the total male, female, adult and child population in Maury County

(A. 23). Note that Mr. Morton incorrectly estimated this figure as being one-third of the total population (A. 23, 31). Some undetermined amount of the total Negro population possessed the qualifications for jury service. Some were subpoenaed for jury service at each term of court but would regularly ask to be excused, and at least 22 Negroes were included within the general venire which was selected in 1948. On the basis of this proof, the district court held that no purpose to discriminate had been shown and that the petitioner failed in his effort to establish a pattern of exclusion of Negroes from jury duty in Maury County during 1949. There is ample testimony in this record to support the finding of the district court.

The petitioner in his brief in the court of appeals pointed out with clarity the three steps followed in the selection of jury panels in Maury County at the time of his trial. These steps are as follows:

> (1) The selection from the tax books of the large list of names of prospective grand and petit jurors by Maury County's board of jury commissioners;
>
> (2) The selection from the jury commissioners' large list of a smaller list, which list made up the prospective grand and petit jurors for a particular term of court;
>
> (3) A narrowing of this smaller list by disqualification or by the judge's excusing from service persons summoned therefor.

These same steps were described in the opinion of the court of appeals at page 14 (A. 74) and again at page 27 (A. 86).

The petitioner contends here that discrimination or systematic exclusion was practiced in the compilation of the general venire or step number one. This was not his contention below. The petitioner would describe his own

actions as failing to "press this point in the court of appeals" (Petitioner's brief, footnote 3). The respondent challenges the petitioner's choice of words and would instead describe the petitioner's present position as an absolute reversal of position since the petitioner, in presenting his position to the court of appeals, clearly admitted that discrimination was not practiced in either of the first two steps. The petitioner said:

> "Appellant contends that the District Court's decision was addressed only to the first two of these three steps in arriving at jury panels from which jurors who actually served on grand and petit juries are selected. **And Appellant on the basis of the evidence introduced in the District Court cannot quarrel with the decision on those points.**" (Brief of Petitioner-Appellant, United States Court of Appeals for the Sixth Circuit, p. 10, emphasis added).

The court of appeals in attempting to isolate the petitioner's complaint stated on page 15 (A. 74):

> "On the basis of the evidence introduced in the district court, appellant now concedes that there was no systematic exclusion in the first two steps. Therefore, if systematic exclusion of Negroes did in fact take place it would be the result of step three, *i. e.*, either by disqualification or by the judge excusing from service persons summoned therefor." (See also A. 86-87.)

The petitioner is, of course, bound by judicial admissions of counsel. **Oscanyan v. Arms Company**, 103 U. S. 261 (1880); **Bosworth v. Terminal R. Ass'n.**, 174 U. S. 182 (1899). The petitioner having previously admitted that he had not proved discrimination in the selection of the master jury list or general venire from the tax books and in the selection of the lesser list for prospective jurors for a particular term of court or venire facias should not now

be heard to reverse his earlier stand and contend that he had carried his burden of proving discrimination in the selection of the general venire. The petitioner should not be permitted to attempt to hold the court of appeals in error on a proposition which he conceded and gave this court no opportunity or reason to consider.

The petitioner's thrust in the court of appeals was that discrimination did not result in the jury selection process until step number three was reached. He contended that systematic exclusion of qualified Negroes from jury service resulted from a practice of "systematic excusing" (A. 88) of Negroes from jury duty practiced by Judge Ingram. The petitioner apparently calls upon the Court to rule that the discretion allowed to the trial judge by **Williams Tenn. Code** § 10011 is unconstitutional because of the liberality shown pursuant thereto to requests made by Negroes to be excused from jury duty. The petitioner apparently argues that it was offensive to whites in Maury County, Tennessee to have Negroes serve on juries and that because of this community attitude they requested to be excused knowing full well that the judge normally excused both white and Negro if they preferred not to serve (A. 43). There is no proof of any such hostile community attitude and even if it existed it would hardly constitute state action. If this is the gravamen of the petitioner's argument, it would not appear to be of moment whether 0% or 20.79% of the general venire was Negro for a racist community attitude, coupled with a lenient judge, would insure perpetuation of an Anglo Saxon jury. The fact that the petitioner was made a "trustee" at the Maury County jail even after he turned loose all of the other prisoners belies any such feeling either against the petitioner or his race (Deposition of Flo Flemming, pp. 4-5; Deposition of Larce M. White, pp. 7-8).

The petitioner contended below that regardless of intent or justification "official action" or "systematic excusing"

by the trial judge in relieving Negroes from jury service at the request of these jurors or their employers or for any reason amounted to "systematic exclusion" and such a purposeful discrimination against Negroes as to render void the conviction of any member of this race. Note, however, that the petitioner has absolutely failed to show that any of the at least 22 Negro veniremen on the general venire and presumably available for service on his case requested to be excused or were excused from jury service. He went no further than to say that the twelve jurors at his trial were white. A mere showing that a class was not represented in a particular jury is not enough. There must be a clear showing that its absence was caused by discrimination. The burden is upon petitioner to prove such discrimination to be purposeful and intentional. **Fay v. New York**, 332 U. S. 261 (1947). Further, there is not even an inference from the proof that Judge Ingram excused any veniremen without first receiving a request to do so by or on behalf of the prospective juror. Nor is there any suggestion that the requested excusals were involuntary or the result of pressure, coercion or influence exerted from any source.

District Attorney General Paul Bumpus testified that at or about the time of the petitioner's trial, Negro jurors regularly asked to be excused from jury service for various reasons, sometimes because they were needed at their jobs and sometimes because they just didn't want the responsibility of serving (A. 40, 42-43). The petitioner's defense counsel testified accordingly (A. 50, 52). If the petitioner's contention becomes the law, no Negro defendant could have been lawfully convicted in Maury County because of the failure of fellow members of his race to accept this responsibility of citizenship. The petitioner apparently advocates that the trial judge was obligated to force some Negroes to remain on jury duty regardless of their jobs, commitments, or wishes solely in

order to maintain an appearance of constitutionality. This is jury packing and equally as unconstitutional as the converse. Jurors should be selected as individuals, on the basis of individual qualifications, and not as members of a race. **Cassell v. Texas**, 339 U. S. 282 (1950).

It is not required that there be a proportionate representation in the jury venire of all races, classes, and religions present in the community. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. **Akin v. Texas**, 325 U. S. 398 (1945); **Swain v. Alabama**, 380 U. S. 202 (1965). In **Akin v. Texas**, *supra*, the population of the community was approximately 15½% Negro, a substantial number of which were qualified to serve as jurors. Yet, it was shown that only one Negro had served on each of two successive jury venires. This Court held that this fact alone did not prove racial discrimination. In **Swain v. Alabama**, *supra*, decided in 1965, there had been an average of 6 to 7 Negroes on petit jury venires for 15 years, but no Negro had actually served on a criminal petit jury. This Court held that it did not consider an average of 6 to 8 Negroes on these panels as constituting forbidden token inclusion or invidious discrimination. See **Hoyt v. Florida**, 368 U. S. 159 (1961).

Due to the unique character of the petitioner's theory that you must look solely to the result of the trial judge's action rather than to its reasonableness, the respondent has been unable to locate a case exactly on point but would direct the court's attention to a somewhat analogous situation in **Swain v. Alabama**, *supra*. In this case, the prosecution was allowed to pre-emptorily challenge all Negroes in the general venire. The Negro defendant contended that his constitutional rights had been violated by the prosecution's obvious systematic and arbitrary exclusion of all Negroes in the general venire. Alabama argued

that its system of jury selection provides justification for the striking of any group of qualified jurors, whether they be Negroes, Catholics, accountants, or those with blue eyes. This Court in affirming the defendant's sentence of death stated ". . . we think there is merit in this position" (P. 212).

If it is constitutional for the prosecution to arbitrarily strike all Negroes from a jury panel because of their race, then certainly it is constitutional for a judge to honor the voluntary request of any juror, regardless of race, color, or creed to be excused from jury service. It should be noted that no showing has been made that Judge Ingram employed any different standard in dealing with requests for excusal from prospective white jurors than that used with prospective Negro jurors. In fact, District Attorney General Bumpus testified that all prospective jurors received equal and sympathetic treatment on their requests for excusal from jury service regardless of race (A. 43).

The respondent feels that **Kennedy** will be persuasive that no unconstitutional exclusion of qualified Negro jurors by jury commissioners, judge, prosecution, or any source existed in Maury County immediately prior to, in, or subsequent to 1949. Some 1100 pages of testimony were there taken on this issue. The jury commissioners of Maury County were among those testifying. This proof showed that 10 out of 109 citizens summoned for the venire facias were Negro and that 4 out of 59 citizens drawn for prospective petit jury service were Negro. Although the use of population statistics in jury discrimination cases was well established at the time of **Kennedy**, it is perhaps illuminating to note that the defendant's counsel, including a present member of the Court, saw fit not to base their argument on the theory of a disproportionate representation of the Negro race on the jury venires (**Kennedy v. State**, *supra*, at p. 317).

The respondent does not now and has never contended that **Kennedy** should be conclusive of the instant issue. Of course, in habeas corpus proceedings a federal court under certain circumstances may adopt findings of fact made in a state court proceeding in the same case. **Townsend v. Sain**, 372 U. S. 293 (1963). Likewise, the findings of a state court in the same case on the issue of discrimination, although not binding on the Court, are entitled to great respect. **Pierre v. Louisiana**, 306 U. S. 354 (1938). By the same reasoning process, this Court should be entitled to consider the findings of **Kennedy**, as at least persuasive of the instant issue, particularly in light of the presumption that the jury commissioners and the trial judge performed their duties in a legal and constitutional manner until proven to the contrary. **Akins v. Texas**, *supra*. The petitioner, however, says that **Kennedy** is demonstrably erroneous on its own record. The petitioner and his mathematician apparently argue that the probability of only selecting 7 Negroes in a venire facias of 109 from a group of 11,771 qualified citizens (A. 24), 24.70% of which were Negroes is so slight as to leave no reasonable conclusion but that the general venire had been manipulated in order to produce only token compliance. Once again the fallacy of this argument is that there is absolutely no showing as to the number of adult males, white or Negro, possessing the qualifications for jury service.

It is submitted that the explanation offered both by District Attorney General Bumpus and Mr. Tomlinson as to why relatively few, if any, Negroes actually sat in the jury box as members of grand or petit juries in Maury County prior to and in 1949 is reasonable and amply supported in the record. The petitioner characterizes this explanation as unsatisfactory but the testimony of these lawyers is undisputed and was regarded by the district judge as "highly credible" (A. 58). The explanation did satisfy the district judge.

CONCLUSION.

The petitioner has previously conceded that he failed to prove any unconstitutionality in the formation of the general venire or step number one and the formation of the venire facias or step number two. He now seeks to recant and on the basis of an inaccurate statistical theory, advance a proposition which he has previously acknowledged to be not borne out by the proof. The petitioner has failed to show any improper purpose or bias on the part of Judge Ingram in his disposition of requests from Negro or white veniremen to be excused from jury duty. He has failed to show that any of the numerous Negro veniremen available for his trial requested to be excused or were excused by the trial judge. He has failed to show that these Negro veniremen were not available for selection as members of the grand jury that indicted him or petit jury that convicted him. The proof establishes that numerous members of the general venire were Negroes. The proof instead of showing discrimination against Negroes, on the contrary establishes that great latitude was extended to them by the trial judge. It is submitted that the district court correctly held that the petitioner failed in his effort to establish a pattern of exclusion of Negroes from jury duty in Maury County during 1949. It has not been shown that this decision is "clearly erroneous" and it should again be affirmed.

Respectfully submitted,

.....

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Affidavit of Service.

State of Tennessee }
County of Davidson }

Ed R. Davies, being duly sworn, says that he served the foregoing brief upon J. Brad Reed, attorney for the petitioner, on Friday, December 15, 1967, by leaving a copy at his office at 1000 American Trust Building, Nashville, Tennessee 37201, with the person in charge thereof.

.....
Ed R. Davies.

Sworn to and subscribed before me, this 15th day of December, 1967.

Imogene P. Etter,
Notary Public.

My commission expires: Oct. 4, 1969.
(Seal)

SUPREME COURT OF THE UNITED STATES

No. 700.—October Term, 1967.

Brooks Lee Anderson, Petitioner, *v.* Johnson, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March 25, 1968.]

Per Curiam.

Four members of the Court would reverse. Four members of the Court would dismiss the writ as improvidently granted. Consequently, the judgment of the United States Court of Appeals for the Sixth Circuit remains in effect.

Mr. Justice Marshall took no part in the consideration or decision of this case.